



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: HU/11596/2017

**THE IMMIGRATION ACTS**

Heard at Field House  
On 19 December 2018

Decision & Reasons Promulgated  
On 7 March 2019

Before

DEPUTY UPPER TRIBUNAL JUDGE I A LEWIS

Between

L O A  
(ANONYMITY DIRECTION MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Representation:**

For the Appellant: Mr O Yekinni of Chris Alexander Solicitors  
For the Respondent: Mr N Bramble, Home Office Presenting Officer

**DECISION AND REASONS**

1. This is an appeal against the decision of First-tier Tribunal Judge M A Khan promulgated on 25 October 2018 in which he dismissed the appeal of the Appellant on human rights grounds against a decision of the Respondent dated 26 September 2017 refusing leave to remain in the United Kingdom for the purpose of continued contact with his daughter.

2. I make an anonymity order in these proceedings because they involve and impact upon a minor who has been the subject of proceedings before the Family Courts in the United Kingdom.
3. The Appellant's personal details and immigration history are a matter of record on file I do not make reference to his personal details in keeping with the anonymity order, and only refer to his immigration history insofar as it is relevant for the present purposes.
4. The Appellant is the father of P a British citizen child born on 24 May 2013. He does not live with P or P's mother. The Appellant applied for a 'Child Arrangements Order' pursuant to section 8 of the Children Act 1989 in the Central Family Court. An Order was made by the court on 14 April 2016 (copy on file). It may be seen on the face of the Order that there was involvement of a CAFCASS officer in the proceedings, and that the Order directed that the Appellant should spend time with P in accordance with the particulars of the Order which provided for weekly direct contact.
5. The Appellant was last granted leave to remain from 7 November 2014 until 7 November 2016. This grant of leave was following reconsideration by the Respondent of a refused application, and is stated on the papers to have been a grant of leave outside the rules - "LOTR". I have not been able to identify on file any documents that authoritatively indicates the exact basis of this application or the grant of leave to remain. The Appellant has asserted in his witness statement dated 11 December 2017 that he was granted leave on the basis of his parental relationship with his daughter (paragraph 6 of witness statement). This assertion does not appear to have been disputed by the Respondent before the First-tier Tribunal.
6. The Appellant applied for further leave to remain by way of an application form signed on 14 October 2016 sent under cover of a letter dated 17 October 2016. Essentially he applied on the basis that he wished to continue to enjoy his relationship with his daughter pursuant to the contact order that he had obtained.
7. The Appellant's application was refused for reasons set out in a 'reasons for refusal' letter ('RFRL') dated 26 September 2017. The Respondent considered the application in the first instance pursuant to the 'parent route' under Appendix FM. The Respondent decided that the Appellant failed on 'suitability' grounds because he had failed to provide without reasonable excuse specific information requested by the Respondent in the course of the application.

8. The Respondent also decided that the Appellant's application failed on 'eligibility' grounds because he had not satisfied the decision-maker that he was exercising direct contact with his daughter – "... you have not produced evidence that you have direct access in person and are maintaining contact with your child.... [I]t is not accepted that you have evidenced you have direct access in person to your child". Necessarily, this assessment by the Respondent was consequential upon the Respondent determining that the nature of the supporting documentary material provided by the Appellant was not satisfactory. It was acknowledged that the Appellant had provided "a child contact order", but this was not considered to be sufficient in itself to meet the requirements of the Rules. The key passage in the RFRL that encompasses both these points is in these terms:

*"We have reached this decision because your court order only states the stipulations around your agreed contact. It does not actually prove that you have contact between yourself and your daughter. After being prompted to provide evidence on formal headed paper that you are involved in your daughter's life you did not provide us with any information. It is stated in the court order that you were to be added to your daughter's emergency contact details at her nursery as you may be required to pick her up so there is no reason why you would be unable to provide this information to us. Although you state that you have contact and that you financially support your child you have not provided any contact and this financial support can continue from outside the UK."*

9. I pause to note that the Appellant was "prompted to provide evidence" by way of correspondence from the Respondent that has been reproduced in the Appellant's bundle before the First-tier Tribunal. The Respondent wrote to the Appellant's representatives on 2 August 2017 stating, in part:

*"If your client does not reside with his child then please provide documentary evidence to confirm that your client has contact with his child. This should include your child's full details including name and address, be dated within the last 3 months and should be unofficial headed paper and be from your clients child school, nursery, health visitor, GP or Local Authority. The letter should confirm what contact your client has with his child, example weather has attended appointments with them whether your client is listed as one of their emergency contacts."*

10. The Appellant's representatives made a response by recorded delivery sent on 7 August 2017 enclosing: bank statements which were said to show regular financial support to the Appellant's daughter's mother; the Family Court Order of 14 April 2016; photographs of the Appellant and his daughter; and a booklet including photographs of a visit to Chessington World of Adventures in May 2017. The correspondence reproduced in the Appellant's bundle reveals a degree of misunderstanding and/or miscommunication between the Appellant's representatives and the Respondent: however, ultimately it is clear enough that the Respondent asserted that the material submitted on behalf of the Appellant was not considered adequate to establish the claimed relationship between the Appellant and

P, and the Appellant's representatives disputed this position – see Respondent second letter of 22 August 2017, and the representatives email of 23 August 2017.

11. The Appellant's application was also refused on private life grounds under paragraph 276 ADE (1) of the Rules.
12. The Appellant appealed to the IAC.
13. The appeal was dismissed for reasons set out in the decision of First-tier Tribunal Judge Khan.
14. The Appellant applied for permission to appeal to the Upper Tribunal which was granted on 14 November 2018 by First-tier Tribunal Judge Lever.
15. In light of the helpful discussion that took place during the hearing this morning Mr Bramble in due course indicated that he did not seek to make any further submissions by way of resisting the challenge raised on behalf of the Appellant. In all such circumstances I set aside the decision of the First-tier Tribunal for inadequacy of reasons amounting to a material error of law.
16. In this context I note in particular the following matters.

(i) At paragraph 18 of the Decision the Judge characterised the Appellant's evidence as being vague and evasive: *"I find the Appellant's evidence with regard to the continuous contact with his daughter as vague and evasive"*. However it is not possible to discern within the Decision what it was about the Appellant's evidence that might be said to be either vague or evasive. In the circumstances the Judge has not adequately explained his characterisation of the Appellant's evidence.

(ii) The Judge identified that the Appellant had produced a number of photographs of himself with his daughter including photographs taken at Chessington World of Adventure in May 2017, together with other photographs dating from 2016 and 2017 - albeit that most of the photographs produced by the Appellant were taken in 2018 (see paragraphs 20 and 24). In my judgement the acknowledgement of the existence of these photographs is not readily reconcilable with the Judge's conclusion that the Appellant had not maintained direct contact with his daughter between the date of the Family Court order in April 2016 and - on the Judge's findings - about October 2017 (see paragraph 22). The photographs were significant because they appeared to support the

claim of contact continuing through 2016 and 2017; in such circumstances they could not, without more, be in effect substantively marginalised by the Judge's comment that "*these photographs do not take the matter a great deal further*" (paragraph 24).

(iii) At paragraph 23 of the Decision the Judge noted the Appellant's bank statements and his evidence with regard to making regular financial payments by way of maintenance. The Judge notes two significant payments in August 2015 and December 2015, and then states: "*There are regular payments into the account until about June 2016. Thereafter they fade away to very small sums*". It is not readily discernible from the bank statements that the maintenance payments did indeed fade away to very small sums. The bank statements seem to demonstrate that there were regular monthly payments continuing well after June 2016, usually going out of the Appellant's account by way of a mobile phone transaction on or about the 15<sup>th</sup> or 16<sup>th</sup> of the month. The sum is usually of the order of £100 or £120. It is difficult to see that this is significantly different from the pattern of maintenance payments prior to June 2016. It is not readily discernible on what reasoned basis the Judge concluded that the sums had 'faded away'.

(iv) Moreover it is to be noted that the Judge appears to have accepted that the Appellant was exercising contact with his daughter at least from October 2017. This was in the context of a hearing taking place approximately a year later in October 2018. In such circumstances one would have expected to see a clear evaluation of the best interests of the Appellant's daughter, notwithstanding the Judge's conclusion at paragraph 25 that "*the child in this case is being used as means for the Appellant to remain in the UK*". It seems to me that even if there had been a suggestion of a cynical motivation on the part of the Appellant it would still be incumbent upon a decision-maker to consider the matter from the perspective of the child who might, or might not, be aware of the motivation of her father in maintaining contact with her. Whilst of course it might have been open for a decision-maker to conclude that if the Appellant were successful in securing leave he would then cease his contact with his daughter, the Judge makes no such finding. There is no express reference to 'best interests' at any point in the decision.

17. In the circumstances the decision of the First-tier Tribunal Judge is set aside.
18. The decision in the appeal will require to be remade after careful consideration of all available evidence including any further evidence that the Appellant might now wish to seek to file - to demonstrate continuing involvement with his daughter, and/or to attempt to meet any concerns that might relate to possible cynical motivation on his part, and/or to provide any further evidence that might be available in relation to the period that had attracted the concern of the First-tier

Tribunal Judge. However, the exact nature of any further evidence that the Appellant may wish to file is ultimately a matter for him (perhaps with the guidance of his advisors); the former is not intended to stand as specific Directions, or otherwise to be either prescriptive or proscriptive.

### **Notice of Decision**

19. The decision of the First-tier Tribunal contained a material error of law and is set aside.
  
20. The decision in the appeal is to be remade before the First-tier Tribunal by any Judge other than First-tier Tribunal M A Khan, with all issues at large.

### **Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008**

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

Signed:

Date: 5 March 2019

**Deputy Upper Tribunal Judge I A Lewis**