IAC-AH-KEW-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/04369/2014

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 13 November 2014	**On 26 November 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE MCWILLIAM

Between

MR KK
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms H Ndi, Counsel
For the Respondent: Mr T Melvin, Home Office Presenting Officer

DETERMINATION AND REASONS
Direction regarding anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

The Appellant is granted anonymity throughout these proceedings, unless and until a Tribunal or court directs otherwise. No report of these proceedings shall directly or indirectly identify him or any member of their 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.

1. The appellant is a citizen of the Ivory Coast and his date of birth is 24 May 1965.

2. On 12 October 2013 the appellant made an application to vary his leave to remain in the UK under the parent route of Appendix FM on the basis that he has regular access with his British citizen child here. The application was refused because the Secretary of State was of the view that the appellant had failed to provide evidence of access.

3. The appellant appealed against the decision of the Secretary of State and his appeal was dismissed by Judge of the First-tier Tribunal Baldwin in a decision that was promulgated on 21 August 2014 following a hearing on 15 August 2014. The appellant made an application for permission to appeal which was granted by Judge of the First-tier Tribunal Brunnen in a decision of 8 October 2014. Thus the matter came before me.

The Decision of the First-tier Tribunal

4. The appellant's evidence was that he has a daughter, S, who was born on 1 January 2011. He is separated from the child's mother. He has regular contact with S. He produced a letter from the Child Support Agency of 14 October 2013 in order to establish that he was paying maintenance. He produced a parental responsibility agreement signed on 6 January 2014 and an application for contact dated 6 February 2014 and documentation establishing that there had been a court hearing in the family court on 1 April 2014. The appellant's evidence was that the case in the family court had been adjourned twice. He produced a letter from CAFCASS which indicated that he had an appointment with them on 12 May 2013. His oral evidence at the hearing was that a court date had been fixed on 10 September 2014.

5. The Judge made the following findings at paragraphs 17-20

> "17. I have given careful consideration to all the documents before me and to the oral evidence and submissions which are set out in the record of proceedings. In relation to Article 8 I have had regard to the considerations set out in S.117 and conducted the balancing exercise required.
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> 18. In considering my Findings of Credibility and Fact, it has become clear that the Appellant's evidence needs to be approached with a degree of caution. He came to the U.K. in 2000 on a 6-month Visa but did not leave when he should have done. The next year he made an unsuccessful spouse application. Served with an IS15A1 in August 2004, he did not leave. In 2009 he made an unsuccessful application for an EEA Residence Card. Eventually he was granted discretionary leave until 20.10.13. Shortly before the expiry of this leave, he sought an extension on the basis that the circumstances in which his leave had been granted remained

the same. Subsequently his claim in that regard began to unravel and he has now made it clear that his situation had changed quite a lot and he had moved in with another lady in August 2012. Neither this other lady nor any other friend have provided evidence about his relationship with his wife or their child. There is no evidence to confirm that the letter purportedly signed by his wife was signed by her and neither her Passport nor her Driving Licence has been provided. His claim that it is genuine has to be considered in light of the fact that, just a few months earlier, he had led the Respondent to believe he was still in a relationship with her, one which had come to an end 14 months previously. It also has to be considered in the light of the fact that it would appear to make very little sense for him to have had to go to Court to make a Contact Application in February 2014 following her refusal to sign a Parental Agreement, and for the case to continue in April 2014 and beyond if he was having regular and unrestricted contact with the child, as the letter in her name asserts. It is of course possible that the letter from CAFCASS is genuine and that the Application is still pending, but the alteration of the date of that letter from 2013 to 2014 does not inspire confidence in it being a very recent letter. It was simply not possible to determine whether the child on a Fairground ride to which I was pointed on his mobile phone is the Appellant's daughter and the photograph of a child on a Father's Day Card looked to me to be one rather older than one not yet three years old, though appearances can of course be deceptive and little weight should perhaps be attached to that last point.

19. A number of the factors above are singularly unhelpful to the Appellant's credibility. The evidence presented is also striking as much because of the lack of evidence of a kind which one might expect to see in a case of this kind – particularly one where the Appellant has been represented from the time he submitted his misleading Application. Not a single friend has been called to corroborate his claim to be playing a very active role in his daughter's life and the fact he has taken out court proceedings for contact with the child suggests his claim in this regard is not likely to be genuine. The timing of it suggests he may well only have done so in order to try and provide a less inadequate basis for remaining in the U.K. If his claim to have undertaken invaluable voluntary work over a number of years were well-founded, one might also expect to see letters from organisations for which he has worked voluntarily, but the documentation relating to his work here would appear to be limited to that for which he has been paid. The Appellant, I find not to be a credible witness and I conclude that his claim to have ongoing contact with his daughter not proven and improbable. It is clear that his marriage came to an end, in practice if not in law, at least two

years ago, and it would seem clear that any violence which did take place was two-sided.

20. The Appellant has, I find, not proven that he is having any contact with his child who resides with his wife with whom he has not lived for two years. Given the number of occasions upon which the Appellant has put forward a partner in order to try and found a claim to remain in the U.K., and his most recent attempt to try and lead the Respondent to believe his relationship with his wife was still extant in October 2013, it is not unreasonable to believe that his wife may well believe their daughter's best interests are not well served by allowing him to play any part in their lives. There is no proof that a Contact Hearing is scheduled for September 2014. However, if that is indeed the case, and the Court concludes in the knowledge of the factual and Credibility Findings in this Determination, that the child's best interests would be served by her having regular contact with the Appellant, then he will be able to make a further and properly evidenced Application. In the absence, however, of any proven contact, I find that the Appeal must fail under the Rules in this respect."

Conclusions

6. At the hearing before me it was established that the appellant had submitted with the permission application a copy of a court order in relation to S which was made on 10 September 2014. There was no challenge to this by Mr Melvin. It was an order for contact between the appellant and S. Both parties agreed that should there be a material error of law I would be able to go on to make the decision without the need for a further hearing.

7. The court order was not before First-tier Tribunal Judge Baldwin; however, it is a fact that a court order has been made which establishes that the appellant has access rights to his daughter and that this was the only issue raised by the respondent in relation to Appendix FM. The Judge cannot be blamed for failing to take into account evidence that was not before him; however, the result of this is that there has been unfairness which amounts to a material error of law. In light of the evidence now before me, I find that the appellant has established that he meets the requirements of Appendix FM and the appeal should be allowed under the Immigration Rules.

8. The decision of the First-tier Tribunal to dismiss the appeal under the rules is set aside and I remake the decision and allow the appeal.

Signed Joanna McWilliam Date 24 November 2014

Deputy Upper Tribunal Judge McWilliam