



**Upper Tribunal
(Immigration and Asylum Chamber)
IA/32743/2015**

Appeal Number:

THE IMMIGRATION ACTS

Heard at Field House

**Decision & Reasons
Promulgated**

On 16th November, 2017

On 14th March, 2018

Before

UPPER TRIBUNAL JUDGE CHALKLEY

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

D N K

(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Mr S Walker, a Senior Home Office Presenting Officer

For the Respondent: No appearance

DECISION AND REASONS

1. This is an appeal by the Secretary of State, however I shall refer to the parties as they appeared in the hearing before the First-tier Tribunal.
2. The appellant is a national of Kenya who was born on 2nd August 1979, and who appealed to the First Tier Tribunal against a decision of the respondent to refuse to grant him leave to remain taken on 28th September, 2015. His appeal was heard at Taylor House by First-tier Tribunal Judge Davey.

3. The appellant had sought leave to remain on the basis of his Article 8 rights, claiming a family life with his spouse and with children. The Secretary of State concluded that in respect of the parent route requirements of Appendix FM are LTRPT.1.1.(d) of the Rules, there had been a failure by the appellant to show sole responsibility as a parent and the appellant had failed to provide any evidence that he was taking an active role in his children's upbringing. As a result the Secretary of State went on to consider whether EX.1. of FM applied, but concluded that the appellant did not meet the eligibility requirements and could not therefore take advantage of the benefit under EX.1. The Secretary of State assessed the claim with reference to 276ADE and found that the appellant did not meet the continuity of residence in the UK for the purposes of ADE(1)(iii), nor because of his age (iv) and (v) of the Immigration Rules.
4. The judge heard oral evidence and, referring to Sections 117A to 117D of the 2002 Act, concluded that the issue turned on whether or not there was a genuine and subsisting parental relationship with a qualifying child. The judge had no doubt that at least the eldest child was a qualifying child. The judge concluded that the appellant's removal was not in the children's best interests and had demonstrated that there were exceptional circumstances which show that it would be disproportionate to justify the refusal of leave to remain.
4. The Secretary of State challenged the judge's decision in allowing the appeal under Article 8, asserting that the judge had not given sufficient reasons for allowing the appeal. At paragraph 17 of his determination, the judge accepted that the children were British subjects, but had not made any particular findings on what parental responsibility the appellant exercised.
5. Having read, insofar as I was able, the handwritten Record of Proceedings, I pointed out that it appeared that the judge may have had oral evidence before him which would satisfy the Rules but unfortunately I was not able to read it. I adjourned the hearing and directed that the judge should provide a typed copy of the Record of Proceedings.
6. That record has been provided today and Mr Walker has confirmed to me that he has read it. He accepts that there was evidence before the judge showing contact and showing a parental relationship between the appellant and at least one, if not both of the children. As a result, Mr Walker accepted that while there was an error in the judge's decision, it was not material to the outcome of the appeal.
7. In making his decision, First-tier Tribunal Judge Davey did not make a material error of law and I uphold the decision.

Summary

The appellant's appeal is allowed.

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.

Richard Chalkley
Upper Tribunal Judge Chalkley

TO THE RESPONDENT
FEE AWARD

As I have allowed the appeal and because a fee has been paid or is payable, I have considered making a fee award and have decided to make a fee award of any fee which has been paid or may be payable for the following reason. The appellant's appeal has been successful.

Richard Chalkley
Upper Tribunal Judge Chalkley