



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: HU/11958/2018

THE IMMIGRATION ACTS

**Heard at Field House
On 30 April 2019**

**Decision & Reasons
Promulgated
On 07 May 2019**

Before

UPPER TRIBUNAL JUDGE KAMARA

Between

BK
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

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

DECISION AND REASONS

Introduction

1. This is an appeal against the decision of First-tier Tribunal Judge Lingam, promulgated on 8 January 2019. Permission to appeal was granted by Upper Tribunal Judge Grubb on 13 March 2019.

Anonymity

2. A direction is set out below owing to the fact that this appeal concerns a vulnerable minor.

Background

3. The appellant, who has had no leave to remain since January 2005, applied for further leave to remain as a partner and the parent of a daughter from a previous relationship on 29 March 2017. That application was refused owing to his inability to meet the requirements of the Rules on suitability grounds owing to his previous use of a false identity and on eligibility grounds because he was in the United Kingdom in breach of immigration law. It was not accepted that he had demonstrated his parental relationship with his daughter, C nor that there were any insurmountable obstacles to family life with his partner continuing elsewhere.

The hearing before the First-tier Tribunal

4. Following the hearing before the First-tier Tribunal, the judge found that although the application did not fall foul of the suitability requirements and that discretion ought to have been exercised differently, the appellant's partner could support an application for entry clearance and that the temporary separation would not lead them to suffer insurmountable obstacles to family life. The judge considered the appellant's relationship with C outside the Rules but concluded that the appellant's temporary separation from his daughter (whom he had not seen since June 2018) would not amount to a human rights breach.

The grounds of appeal

5. The grounds of appeal argued that the judge failed to take into consideration the impact of removing the appellant while proceedings were ongoing in the Family Court for him to have contact with C. Furthermore, it was said that a decision was imminent and if positive it would ultimately entitle the appellant to leave to remain as the parent of a British child.
6. Permission to appeal was granted on the basis sought.
7. The respondent's Rule 24 response, received on 17 April 2019, stated that the appeal was not opposed and that the Tribunal was invited to determine the appeal with a fresh oral hearing limited to exceptional circumstances in relation to the family proceedings and associated issues.

The hearing

8. Prior to the hearing, the appellant submitted a bundle of documents which included a Child Arrangement Order from the Family Court at East London dated 9 April 2019 and reference to further hearings on 4 June 2019 and 12 July 2019.

9. Mr Tarlow sought instructions from the Secretary of State with regard to whether a short period of leave would be granted. He was instructed that the Secretary of State was not prepared to do so of his own volition, but Mr Tarlow was asked to request that I either adjourn the hearing or direct that the respondent grants the appellant a short period of leave.
10. The appellant complained of his strained financial circumstances in the context of pursuing contact with his child. I noted that the Family Court ordered him to pay for the contact centre.
11. I declined to adjourn the appeal as this would not address the appellant's circumstances in the United Kingdom which flow from his unlawful status. At the end of the hearing, I found that the previous judge made a material error of law, set aside her direction dismissing the appeal and remade the matter, allowing the appeal, to the extent that Secretary of State grant the appellant a short period of Discretionary Leave to enable him to continue participating in the Family Court proceedings.

Decision on error of law

12. At (41) of the appellant's witness statement dated 5 December 2018 he referred to the First Hearing Dispute Resolution appointment listed for 3 January 2019 in relation to his application for a Child Arrangement Order. A copy of the hearing notice was enclosed in the appellant's bundle along with other correspondence between the appellant and the Family Court. All this material was before the judge.
13. The First-tier Tribunal did not consider whether the appellant ought to have been granted leave to remain for a short period to enable him to participate in the Family Court proceedings. At [88], the judge concludes that the appellant can continue his challenge to seek access to his daughter from overseas. There was no consideration as to whether this would amount to an Article 8 breach. This is a clear error given the conclusions in MS (Ivory Coast) [2007] EWCA Civ 133 regarding an analogous case at [70];

"In our judgment the AIT did not decide the hypothetical question it was incumbent upon it to decide, namely whether the appellant's Article 8 rights would be violated by a removal when the case was before it i.e. when the contact application was outstanding."
14. Given that omission, I set aside the decision of the First-tier Tribunal dismissing the appellant's Article 8 appeal. The findings relating to his family life with his present partner and his private life are preserved as they were not subject to any challenge. The findings relating to his family life with his child are set aside.
15. I remake the decision by allowing the appellant's Article 8 appeal for the following reasons. The appellant was having regular contact with his child, now aged 6, until his former partner terminated it in the months leading

up to his hearing before the First-tier Tribunal. He has been granted interim supervised contact with his child.

16. According to the child protection plan, there are issues of emotional and physical abuse emanating from the child's mother as well as allegations regarding the appellant's behaviour and motivation for bringing the proceedings.
17. In his most recent witness statement, the appellant states that he is fearful that his child will be taken into care and if this is occurred, he and his wife would wish to apply to have his child live with them.
18. Given the complex issues involved and that the appellant's contact with his daughter is in the process of being assessed, it is obvious that he could not take an effective part in these proceedings if he were removed to Uganda. Given the allegations made by his former partner, the appellant cannot succeed in gaining contact with his daughter without a favourable assessment. Clearly, this cannot happen if he is not in the United Kingdom. Therefore, the respondent's decision to remove the appellant when those proceedings are yet to be concluded would amount to a disproportionate interference with the appellant's right to a family life with his child.
19. The appeal is therefore allowed pursuant to Article 8 ECHR, to the limited extent that the Secretary of State is to grant the appellant an appropriate period of Discretionary Leave which will enable him to pursue the Family Court proceedings to their conclusion.

Summary of decision

The making of the decision of the First-tier Tribunal involved the making of an error on a point of law.

I set aside the decision to be re-made.

I substitute a decision allowing the appeal.

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 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.

Signed

Date: 01 May 2019

Upper Tribunal Judge Kamara

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 no fee award for the following reason. At the time of the respondent's decision, the Family Court proceedings had not commenced.

Signed

Date: 01 May 2019

Upper Tribunal Judge Kamara