IAC-AH-DP-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/02850/2013

THE IMMIGRATION ACTS

Heard at Centre City Tower, Birmingham	**Decision & Reasons Promulgated**
On 23rd October 2015	**On 13th November 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

TK
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Vijay Jogadeshan (Counsel)
For the Respondent: Mr David Mills (HOPO)

DECISION AND REASONS

1. This is an appeal against a determination of First-tier Tribunal Judge Parkes, promulgated on 31st March 2015, following a hearing at Birmingham Sheldon Court on 12th March 2015. In the determination, the Judge dismissed the appeal of the Appellant, whereupon the Appellant subsequently applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

The Appellant

2. The Appellant is a citizen of Zimbabwe who was born on 2nd March 1982. He appealed against a decision of the Respondent Secretary of State dated 7th March 2013, following his representations, made nearly five years ago, in relation to his right to remain in this country on the basis of Appendix FM, paragraph 276ADE, arising from his relationship with his stepchild M, although it was accepted, as DNA tests had proved, that he was not the natural father of the child of his wife.

The Appellant's Claim

3. The Appellant's claim is that his removal from the UK would be a disproportionate interference with his Article 8 rights based on the rights of others, and in particular, on M, a child with whom he maintains a parental relationship, and that his removal would not be in her best interest.

The Judge's Findings

4. The Judge observed that although the Appellant was not the father of M,

> "... to the Appellant's credit, the evidence suggests that the Appellant's interest in M has been consistent over time and in line with the geographical limitations imposed by their living so far apart and his limited means. This is not a case where his interest is waxed and waned in line with the threat of removal" (paragraph 9).

However, the Judge held that in applying Section 117B of the 2014 Immigration Act,

> "... the problem for the Appellant is that his removal would not disturb the living arrangements of M, she would remain with her mother and family in North Somerset and there is nothing about the Appellant's removal that would lead to her being 'expected' to leave the UK" (paragraph 11).

5. The Judge dismissed the appeal.

Grounds of Application

6. The grounds of application state that the Judge failed to have regard to the fact that under Section 117B(6) the Appellant had a genuine and subsisting parental relationship "with a qualifying child" and this had never been considered by the Judge. Secondly, Judge Parkes had proceeded on the basis that the Appellant's role in M's life is "limited" and that it was "not so strong" (see paragraph 20) but this failed to take into account critical evidence. One such piece of evidence was a special educational needs coordinator at M's school who had expressly stated that, "it is very certain that M's father provides an important role in her upbringing which cannot easily be replaced". The family centre worker also described M's relationship with the Appellant as "source of respite ... M also shows an improvement in her behaviour when she sees her father.

If contact ceases an increase in problem behaviour and child difficulties is expected ...".

7. On 3rd July 2015, permission to appeal was granted.

8. On 23rd July 2015, a Rule 24 response was entered by the Secretary of State.

The Hearing

9. At the hearing before me on 23rd October 2015, Mr David Mills, appearing on behalf of the Respondent Secretary of State, submitted that he would have to accept at the outset, that although this was the appeal of the Appellant, there was an error of law in the Judge having failed to consider Section 117B(6), and particular in the light of the fact that he had already accepted at a number of places in the determination, that the Appellant performed parental responsibilities in relation to the child M, who was a qualifying child. Once it was accepted that the Appellant was exercising such parental responsibilities, then the statutory presumption under Section 117B(vi) was now in favour of not removing a qualifying child because the public interest did not require it.

10. For his part, Mr Jogadeshan wisely agreed.

Error of Law

11. I am satisfied that the making of the decision by the Judge involved the making of an error on a point of law, such that I should set aside the decision, (see Section 12(1) of TCEA 2007), and remake the decision. My reasons are two-fold. First, the Judge below has accepted that,

> "... the Appellant's interest in M has been consistent over time and in line with the geographical limitations imposed by their living so far apart and his limited means. This is not a case where its interests are waxed and waned in line with the threat of removal" (paragraph 9).

12. Second, the Judge was wrong thereafter to conclude that, just because their living arrangements were such that they were living separately, or that the Appellant was not the biological father of the Appellant, that this would somehow detract from the role that the Appellant was playing. For example, he states that, "whilst the Appellant does play a part in M's life provides some support for her his role is limited, he is not her biological father and she inevitably will come to know that ..." (paragraph 20).

13. Third, the Judge does not take into account the fact that the child, M, is a "qualifying child", as from the Appellant's point of view, this was the most important provision in Section 117B.

Re-Making the Decision

14. I have remade the decision on the basis of the findings of the original Judge, the evidence before him, and the submissions that I have heard

today. I am allowing this appeal for the reasons I have already set out above. In particular, I note the Judge's findings that the Appellant's interest has been consistent and has not waxed or waned even when things were getting tough for the Appellant.

15. Second, there is evidence in the form of the report from the special education needs coordinator which shows that the Appellant is playing "an important role in her upbringing which cannot easily be replaced". The family centre worker has also said that "if contact ceases an increase in problem behaviour and child difficulties is expected ...".

16. Thirdly, however, as Mr Mills had made clear, the Appellant's child, M, is a British citizen child, and her mother is a British citizen, and M is a "qualifying child" under Section 117B(6) in that there is a genuine and subsisting parental relationship with her from the Appellant's side.

17. Additionally, it would not be reasonable to expect her to leave the United Kingdom which is a prospect that will be thrust upon her if the Appellant is removed back to Zimbabwe and cannot then meet M, bearing in mind that the family centre worker was clear that "M shows an improvement in her behaviour when she sees her father ...". In such a case the public interest consideration is plainly in favour of the Appellant and not against him. I allow the appeal.

Notice of Decision

The decision of the First-tier Tribunal involved the making of an error on a point of law such that it falls to be set aside. I set aside the decision of the original Judge. I remake the decision as follows. This 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 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

Deputy Upper Tribunal Judge Juss 2nd November 2015