Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Numbers:**
HU/13350/2016

HU/18112/2016

THE IMMIGRATION ACTS

Heard at Birmingham	**Decision & Reasons Promulgated**
On 9th January 2019	**On 8th February 2019**

Before

DEPUTY JUDGE UPPER TRIBUNAL FARRELLY

Between

[J B M]
[A M]
~~**(NO ANONYMITY DIRECTION MADE)**~~

Appellants

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the appellant: Mrs Chaggar, Counsel, instructed by Rockland Law
For the respondent: Mrs Aboni, Senior Presenting Officer

DECISION AND REASONS

Introduction

1. The 1st named appellant is the lead appellant. He came to the United Kingdom on a student visa on 9 September 2010. The 2nd appellant is his wife who joined him as his dependent on 15

December 2011.They have a son, [JD], who was born on 3 January 2015. All are nationals of Sierra Leone.

2. The 1st named appellant made an application on 27th January 2016 for leave to remain. This was based on his relationship with his British daughter, [L], born on 15 July 2012. [L] was born following a short relationship he had with Ms [O] (nee [T]), a British national. His wife and son's status were dependent upon the outcome of his application. It was suggested that [L] was not only bonding with the 1st named appellant but also with her half sibling and to remove the appellant and his family would breach the article 8 rights engaged.

3. He had been asked to provide evidence of contact. It was indicated that [L]'s mother would not provide a letter of support. He did provide a letter from Shropshire Council stating he was involved with his daughter. Furthermore, there had been proceedings in the Family Court which provided for unsupervised access to his daughter.

4. His application was refused on 9 May 2016.The respondent did not accept that the 1st named appellant saw his daughter on a regular basis.

5. No other basis was seen for the grant of leave to remain. The 1st named appellant could not benefit under the immigration rules in respect of his own family as they were not British and formed a unit. In terms of his private life he had not been here the necessary period and there were no issues identified in relation to integration to his home country. No other basis was seen justifying leave.

The appeal

6. The 1st appellant appealed the refusal. The notice of appeal included [L]'s birth certificate; a DNA report; the letter referred to from the Council as well as the Court Order; plus photographs as evidence of contact. The right of appeal was restricted to consideration of article 8 albeit initially through the prism of the rules.

7. The appeal was heard at Birmingham on 15 August 2017 before Judge of the First-tier Tribunal N Lodge. The appellants were not represented. The 1st appellant gave evidence to the effect that following the Court Order he initially saw his daughter every fortnight for 2 hours and that now she would stay for weekends. He said she had been staying with him every other weekend over the past year. The judge referred to the Court Order which confirmed access as the 1st appellant stated. There was also a letter from the Council dated 25 April 2016 confirming the appellant was involved in his daughter's life. There was also a letter from a social worker

to the same effect. There was also evidence of financial contributions made.

8. The judge correctly identified the issue for determination if the rules were applicable at paragraph 24: whether the appellant was taking an active role in his daughter's upbringing. The judge concluded that this was not established. At paragraph 26 the judge referred to a letter from a social worker dated 12 May 2016 to the effect that contact was alternative Saturdays. The judge then referred to the 1st appellant's application in which he stated he last saw his daughter on 23 January 2016.The judge said that the application was dated 25 February 2016. Consequently, the judge concluded he was not in fact maintaining regular fortnightly contact as claimed.

The Upper Tribunal.

9. Permission was granted on the basis the judge materially erred in law in rejecting the appellant's claim of fortnightly contact. This was because the judge's conclusion was based upon a factual error. The judge had concluded contact could not be fortnightly because the application was dated 25 February 2016 and he said he last saw his daughter on 23 January 2016. However the application in fact was dated 27 January 2016 and this was confirmed in the refusal letter. It was contended that this error caused a distortion in the evaluation of the 1st appellant's contact. By the time of the hearing the child's mother had provided a letter confirming the first appellant's involvement. The judge however qualified this because she had not attended the hearing. It was argued judge erred in doing so and elsewhere failed to properly evaluate the evidence. Permission to appeal was granted, primarily on the basis the factual error infected the remainder of the judge's findings.

10. At hearing, Mrs Chaggar recited the evidence before the judge and the factual error and submitted that the outcome was unsafe. She referred to the need to consider the best interests of the child involved. She submitted that inadequate consideration had been given to the Contact Order and its application, along with the supporting evidence including the financial contributions made by the 1st appellant.

11. In response, Mrs Aboni submitted that the judge self-directed appropriately and had provided adequate reasoning. It was accepted that the judge had made a factual error in relation to the application but it was submitted this was not material. The judge had referred to the absence of evidence from the child's school to show his involvement. There was a letter from the school which simply confirmed he was named as the child's father. There was also a letter from the child's GP which also stated he was the

child's father but did not indicate his involvement in the key events in her life. The judge had referred to the bank statements showing payments made.

Conclusions

12. The judge correctly identified the issue to be resolved. There was evidence to support the appellant's claim of involvement. The weight to be attached to the evidence was a matter for the judge.

13. The judge took the view that it was extraordinary that the child's mother was unaware that the hearing was taking place or that her child would be attending. The judge commented on the fact that the child was conceived shortly after the appellant's marriage to the 2nd appellant and whilst he awaited her arrival in the United Kingdom. The judge then felt the precise date of the ending of the relationship to be relevant and did not accept the appellant's evidence on this. Whilst these issues may relate to the appellant's character they were not particularly relevant to the issue to be determined.

14. The judge acknowledges the evidence presented in support of the claim. However, the judge then goes on to comment on the absence of evidence which could have further enhanced the claim.

15. As stated, the judge had to evaluate the evidence and assess the level of the appellant's involvement in his daughter's life. It is common case that the judge in rejecting the claim of regularly fortnightly contact did so on a mistake of fact about the date of application.

16. It is my conclusion that this error fundamentally undermines the decision. The appellant had put forward evidence of contact from independent sources. Whilst it was for the judge to evaluate this it was necessary that matters were adequately balanced. The judge has referred to the absence of evidence rather than evaluating the evidence presented. Furthermore, the judge has made comments about the appellant's relationship to the child's mother and the fact he was already married which are not particularly relevant to the issue. I have noted that the appellants were unrepresented. Central to the appeal is the best interests of the children involved. It is my conclusion that the decision is unsafe and will have to be remade de novo in the First-tier Tribunal

Decision.

The decision of Judge of the First-tier Tribunal N Lodge materially errs in law and is set aside. The appeal is to be reheard de novo in the First tier Tribunal

Francis J Farrelly
Deputy Upper Tribunal Judge. Date: 3 February 2019

DIRECTIONS

(i) Relist for a de novo hearing at Birmingham excluding First-tier Tribunal Judge Tribunal N Lodge.

(ii) An interpreter is not required. If for any reason this is not the case the appellants should advise the Tribunal

(iii) The appellants should prepare an updated bundle evidencing the contact. The appellant's appeal would be assisted by evidence from independent third parties to show an ongoing active role in the child's upbringing.

(iv) The hearing should take no longer than 1 hour.

Francis J Farrelly
Deputy Upper Tribunal Judge.