Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU075192015

THE IMMIGRATION ACTS

Heard at Field House **Decision & Reasons Promulgated**
On 26 April 2017 **On 8 May 2017**

Before

UPPER TRIBUNAL JUDGE McWILLIAM

Between

ANTHONY GEORGE ALLEN
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mrs J Bassiri-Dezfouli, instructed by Shuttari Paul & Co Solicitors
For the Respondent: Mr T Melvin, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Jamaica and he was born on 12 March 1984. He made an application for leave to remain which was refused by the Secretary of State in a decision of 25 September 2015. The appellant appealed against this decision and his appeal was dismissed by Judge of the First-tier Tribunal Fletcher-Hill following a hearing at Hatton Cross on 15 July 2016. The decision was promulgated on 5 August 2016. The appellant appealed against that decision and permission was granted by Deputy Upper Tribunal Judge Chapman on 26 February 2017. The matter came before me on 24 April 2017.

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2. Permission was granted on a limited basis as set out in Judge Chapman's decision at paragraph 3 and it is on this basis that I heard submissions from the parties (in the absence of any challenge to Judge Chapman's decision).

3. The appellant's appeal rested on his relationship with a British citizen and their two children. The grounds of appeal and the grant of permission related to the judge's decision in respect of the appellant's relationship with his children. The judge in relation to this issue made findings at paragraphs 62 to 73:

> "62. There is absolutely no reliable evidence of continued contact with the children other than a variety of photographs of small children which, in the tribunal's bundle, are illegible. Given that these children were born in 2011 and 2013 they would now be 5 and 2 years old and had they been in contact it would be normal to expect there to be letters, cards, pictures drawn at school or nursery and given to their father. No such evidence of contact was before the tribunal. In fact there is no credible evidence that he has continued to play any part in their lives in recent years. Indeed, his own evidence is that he lives 40 miles away from his girlfriend, Hayley, living in Chelsea in London with his aunt whereas, she lives in Dunstable, Bedfordshire, close to her own parents. His evidence is that he travels by train to visit when he can afford it and that now and again, every 2 to 3 weeks, when he is in the area he takes his 5-year old to school.
>
> 63. Whether he is in the UK or in Jamaica he will be able to keep in contact with them by modern means of communication if they choose to contact him.
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> 64. I find that although the appellant has been in the UK since at least 2003, the only leave he has been granted was in June 2003 for a period of 16 months and was leave as a student.
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> 65. I find that the leave previously granted expired in October 2004 and the refusal to grant an extension was made on 7 March 2005.
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> 66. I do not find that this appellant has a genuine and subsisting relationship with his British children. I find that he has never lived with them as a family unit.
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> 67. I find that EV Philippines at paragraph 32 makes it clear that the best interests of children should be determined without considering their parents and that in the current case the parents have never lived together as a couple and the children continue to be cared for by their mother as they always have been.
>
> 68. I find that both of the children affected by this case live with their mother and always have done so and that the appellant's involvement in their lives is much less and always has been.
>
> 69. I find that, on the one hand, the appellant and his girlfriend have sought to portray themselves as fiancés, and yet both also acknowledge that they will not marry unless they can afford to do so. At present, and indeed at least for the last 3 years they live 40 miles apart as the appellant lives with his aunt in Chelsea in London and visits from time to time.

70. I find that it is in the best interests of both the children to remain living with their mother as they always have done and in terms of the appellant, he has failed to provide sufficient independent proof of any contact and continuing active role in the lives of his children with whom he has never shared family life.

71. It is trite law that the best interests of a child or children are a primary but not a paramount consideration as per the reasoning in **ZH (Tanzania)**.

72. I have reminded myself of the five step approach set out by the late Lord Bingham in **Razgar v SSHD [2004] UKHL 27** and his approach to Article 8 claims in **Huang and Kashmiri v SSHD [2007] UKHL 11** and that he approved this approach in **EB (Kosovo) v SSHD [2008] UKHL 41**.

73. I find that there are no good grounds for permitting the appellant to stay in the United Kingdom outside the Immigration Rules and that the only compelling circumstance on which he can rely is the fact that his children have been born in the UK and are British citizens. He has never lived in a family unit with the mother of the British citizens."

4. The judge erred in law because she did not give adequate reasons why she did not accept the evidence of the appellant's partner and two live witnesses (Ms Marilyn Reed and Laura Brown) in respect of the appellant's relationship with his children. The judge at paragraph 37 recorded that evidence was given by two other witnesses but did not identify them by name. At paragraph 62 she found that there was "absolutely no reliable evidence of continued contact with the children other than a variety of photographs of small children which, in the Tribunal's bundle are illegible." However, there are no findings of fact in relation to the evidence of the two live witnesses and the witness statements from various friends and family that are contained in the appellant's bundle.

5. The judge made reference to the photographs in the Tribunal's bundle which were illegible. Whilst this was the case, she had before her legible copies provided by the appellant at the hearing. It is clear from paragraph 62 that she saw legible photographs because she described them as showing children. The appellant's partner in her witness statement references the photographs and her evidence is that some are up to date. It is not apparent from the judge's findings why this evidence was not accepted or indeed whether the judge took it into account when she concluded that there was no reliable evidence of continued contact.

6. There was a letter from the children's school at page 185 of the appellant's bundle dated 16 June 2015 which is not written in the past tense and which clearly identifies the appellant as the father. It is not clear from the decision of the judge that she took this letter into account because she commented only on the problems with the first letter from the school at page 184 of the appellant's bundle. The judge stated at paragraph 62 that there is no credible evidence that the appellant has continued to play any part in the children's lives in recent years. This is a finding that may be open to her, but the decision is inadequately reasoned in the light of the evidence before her.

7. The error is material and infects the wider Article 8 assessment and I set aside the decision of the First-tier Tribunal to dismiss the appellant's appeal. Having set aside the decision I am not constrained within the parameters of the grant of permission. It is clear to me that the decision of the judge in relation to the appellant's relationship with his partner is not sustainable as a result of my decision and that the decision in its entirety is set aside.

8. The parties did not submit further evidence in compliance with the directions of the Tribunal. The appellant's representative requested the matter be remitted to the First-tier Tribunal for a rehearing. Whilst accepting that there had been non-compliance with directions she argued that it is in the children's best interests for the court to have up to date evidence and Mr Melvin agreed with this.

9. I accepted the submissions made in respect of venue. The appeal must be heard afresh which will involve an extensive fact finding exercise. None of the findings of the FtT are maintained.

10. I explained at the hearing that it is essential that the Tribunal has up to date evidence relating to the children in order to make a proper best interests assessment. The Appellant, his family, Counsel and solicitor were all present at the hearing before me.

Notice of Decision

The decision of the FtT to dismiss the appeal is set aside. The matter is remitted to the First-tier to be heard afresh.

Signed Joanna McWilliam Date 3 May 2017

Upper Tribunal Judge McWilliam