



UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

THE IMMIGRATION ACTS

Heard at: Field House

Decision Promulgated:

On: 20 May 2014

On 22nd May 2014

Before

Upper Tribunal Judge Pitt

Between

**CUO
(Anonymity Order Made)**

Appellant

and

Secretary of State for the Home Department

Respondent

DECISION AND REASONS

1. The appellant is a Nigerian national who is now 27 years' old.
2. The appeal is against the decision of First-tier Tribunal Judge Mulvenna which dismissed the appeal under Article 8 of the ECHR.
3. The appellant was not represented before me. I provided him with the Tribunal bundle. It became apparent that he was not familiar with key documents in the case, in particular the decision of the First-tier Tribunal, the grounds of appeal and the grant of permission to appeal. I offered the appellant until 2pm to consider

these documents but it was his preference to proceed after an adjournment of half an hour. At the end of that period of time, the appellant indicated that he wished to proceed with the hearing. He gave his views on the case and I also heard from Mr Nath. I reserved my decision.

4. The background to this matter is that the appellant entered the UK on 10 January 2010. He had leave until 30 March 2013 as a student. On 31 December 2011 he married a British national. They had a daughter together on 30 August 2012. The marriage broke down. The appellant's wife prevented him from seeing his daughter and he made an application to the family court for contact. The respondent granted him exceptional leave to remain in order to pursue the family court action, that leave ending on 7 October 2013. On 19 June 2013 he obtained an order allowing contact twice a month at a contact centre. He was also required to pay maintenance for the child.
5. The appellant applied for further leave to remain as a parent on 3 October 2013 but that application was refused under the Immigration Rules and under Article 8 of the ECHR.
6. The appeal then came before Judge Mulvenna on the papers.
7. The grounds of appeal to the Upper Tribunal against the decision of Judge Mulvenna maintained ZH (Tanzania) v SSHD [2011] UKSC 4 had not been correctly applied and the best interests of a British child incorrectly assessed. Her best interests were to develop a relationship with her father. They also argued that the First-tier Tribunal should have determined the Article 8 claim.
8. At [12] to [18] Judge Mulvenna set out the correct law and case law regarding the best interests of the appellant's child. The provisions of s.55 of the Borders, Citizenship and Immigration Act 2009 was clearly in mind in the assessment that was conducted at [19].
9. At [19] he found that the appellant was seeing the child via a third party, the contact centre. That was correct. He found that an application for more access to the child was pending. That was also correct. He found that the child usually lived with its mother, also correct.
10. However, where family life can be presumed to exist between a parent and child and the contact order was before the judge and where the appellant was actively pursuing further contact, it is my view that it could be right to conclude simply that the "most significant contribution to the child's welfare at present appears to be financial" and proceed on the basis that the financial support could continue from Nigeria, the best interests of the child not being affected by the appellant's

removal. His removal deprived the child of the regular contact she was having with him and, realistically, of any additional contact that the appellant was actively seeking at that time. As in LD (Article 8 – best interests of child) Zimbabwe [2010] UKUT 278 (IAC) “[f]amilies normally live together” and “[i]t is not normal for family life to be enjoyed by correspondence and occasional visits (even assuming that there were no obstacles to such visits following this immigration decision).”

11. I accepted that the consideration of the child’s best interests was flawed to the extent that it should be set aside and re-made.
12. The grounds of appeal also had merit as regards the failure of Judge Mulvenna to determine the Article 8 appeal that was before him.
13. The respondent’s decision refused the appellant’s application in terms under Article 8. The grounds of appeal are not of the clearest but it reads them too narrowly to say that they do not raise Article 8 issues. They centre on the appellant’s relationship with his child. At [21], however, Judge Mulvenna states that “I have no detailed arguments or submissions from either party on the question of Article 8 and have not, therefore, considered the position.”
14. It was incumbent on Judge Mulvenna to determine the Article 8 appeal before him regardless of the paucity of evidence or submissions. Where the s.55 assessment is flawed, it did not appear to me that it could be said with certainty what the outcome of an Article 8 assessment would have been.
15. I therefore set aside the decision of the First-tier Tribunal entirely and re-made it.
16. There is no dispute as to the appellant failing to meet the substantive Immigration Rules concerning leave to remain as a parent.
17. The difficulty for the appellant here is that the evidence before me is that the family court have not only declined to increase his contact with his daughter but that the contact has ceased, the appellant’s contact with his daughter now being only indirect via cards, letters and gifts. A final court order dated 24 April 2014 states this to be so.
18. Where the specialist family court has assessed that level of indirect contact as appropriate in its final decision, it did not appear to me that the best interests of the appellant’s child could now be said to be materially affected by his return to Nigeria. He can continue indirect contact with her in the same way from abroad. The economic situation in Nigeria may be less advantageous than that in the UK but I did not have country evidence before me to suggest that the appellant could only earn £60 a month as he submitted at the hearing such that his ability to

support his child would be significantly affected. He is, in any event, only paying £5 a week at present according to the evidence before me. There is the additional matter that the appellant has already had a year of additional leave to remain to address the contact situation with his daughter but the matter has ended, sadly, to his detriment.

19. In short, where the appellant does not have direct contact with his daughter, I did not find that the respondent's decision to refuse leave was a disproportionate interference with the appellant's family life with his daughter.


Decision

20. The decision of the First-tier Tribunal discloses an error on a point of law and is set aside.

21. I remake the Article 8 appeal as refused.

Anonymity

I make an anonymity order under Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, precluding publication of any information regarding the proceedings which would be likely to lead members of the public to identify the appellant, his partner or his child. I do so in the best interests of the child in order to protect her identity and wellbeing.

Signed: 
Upper Tribunal Judge Pitt

Date: 21 May 2014