



UPPER TRIBUNAL  
(IMMIGRATION AND ASYLUM CHAMBER)

APPEAL NUMBER: HU/09885/2016

THE IMMIGRATION ACTS

Heard at: Field House  
On 1 March 2018

Decision and Reasons Promulgated  
On 22 March 2018

Before  
Deputy Upper Tribunal Judge Mailer

Between  
MR FRANK [H]  
ANONYMITY DIRECTION NOT MADE

Appellant  
and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation

For the Appellant: Mr Z Hussain, counsel (instructed by Primar Solicitors)  
For the Respondent: Mr N Bramble, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a national of Zimbabwe, born on [ ] 1993. He appeals with permission against the decision of the First-tier Tribunal Judge V A Cox promulgated on 6 July 2017, dismissing his appeal against the decision of the respondent to refuse his application for indefinite leave to remain in the UK.
2. The appellant applied on 13 August 2015 for indefinite leave to remain. This was refused under paragraph 322(12) of the Rules. The respondent also considered his application on the basis of his claimed family and private life in the UK. The application was refused by the respondent in a decision dated 25 March 2016.
3. It was contended before the First-tier Tribunal that the appellant's daughter was born in the UK on [ ] 2016.

4. It was contended on his behalf that they had lived together from August 2015 and that they were a couple. They met the requirements under Appendix FM and EX.1. There were insurmountable obstacles to the proposed removal to Zimbabwe despite having resided there since the age of 10 and on a full time university course.
5. The Judge found that there were various inconsistencies in the evidence before her. The respondent had not accepted that there was a genuine relationship between the appellant and his asserted partner. He claimed to have resided with his partner since 30 August 2015.
6. The birth certificate in respect of the child did not show the appellant's name and his partner. The only evidence before the Registrar would have been the presence of the couple, who must have informed him of paternity following which there was an automatic registration. There was no evidence that the appellant played any part during the course of the pregnancy or attended scans or was even mentioned in the booking in interview records or by medical staff. The birth certificate stood alone as evidence of paternity. She did not find '...in the comprehensive picture in this matter that it is satisfactory to establish paternity' [46].
7. She therefore found that the couple were not in a genuine and subsisting relationship. Furthermore, there was not satisfactory evidence before him that the child, a British citizen, is the child of the appellant [47].
8. She stated that even if wrong in that respect, she had considered the submissions made on his behalf. It was contended that the appellant's partner is a full time student at the Wolverhampton University and was able to meet the necessary income requirements. A number of sources of income had been referred to. She indicated to counsel that student loan entitlements could not be included in such calculations. A loan is repayable and whilst the appellant's partner is also in receipt of a grant, she agreed with the Judge that the loan must be repaid and the grant would not be counted as income [48].
9. She found that there was no evidence that his partner has an income equivalent to the minimum financial threshold required by the Rules [51]. Nor could the appellant succeed on the basis of his relationship with his daughter, a British citizen, as there is no satisfactory evidence before him that she is his daughter [53].
10. She considered whether there were compelling circumstances. The appellant has resided for the majority of his life in Zimbabwe, has family there including another child. There was nothing to prevent him making an application outside the UK when his sponsor is able to meet the income requirements under the rules [57].
11. On 30 December 2017 Designated Judge Shaerf granted the appellant permission to appeal. It had been asserted in the grounds of appeal that the Judge did not properly address the provisions of s.117B(6) of the 2002 Act, nor the best interests of

the child. The grounds included documentary evidence which was not before the First-tier Tribunal Judge in the form of a DNA test confirming the appellant's paternity. The test report was subsequent to the promulgation of the decision.

12. Judge Shaerf noted that a photocopy of the birth certificate in which the appellant is stated to be the father was before the Tribunal at the date of hearing. On that basis he considered the finding at [47] based on apparent discrepancies about where the appellant and his partner were living at various times without addressing the claims of affection and cohabitation and the statements made by the appellant and his partner amounted to an arguable error of law. That may have infected her finding regarding the lack of relationship between the appellant and the child.
13. Mr Hussain, who did not represent the appellant before the First-tier Tribunal, relied on the grounds of appeal. He submitted that the First-tier Tribunal Judge misconstrued the start of the relationship and failed to consider that it was not formed at a time when the appellant's immigration status was precarious. At that time he was looking forward to submitting an application for indefinite leave to remain here. The Judge allowed herself to be swayed by the respondent's refusal letter.
14. It is also contended that it is "extraordinary" as to how the Judge arrived at his decision despite the facts and overwhelming evidence contrary to LD (Zimbabwe) [2010] UKUT 00278 and ZH (Tanzania) [2011] UKSC 4.
15. It is contended that the Judge failed to give guidance as to what should happen should the DNA prove that the appellant is the father. That is a critical question which the Judge ought to have contemplated and which "he (sic) did not." The Judge as well as the secretary of state have "more (sic) motu powers to subpoena and or to order a DNA test which they could have done and they did not".
16. At page 3 of the grounds it is noted that the appellant now wishes to apply for a DNA test to prove paternity which has been made an issue.
17. It is also contended that the Judge erred in failing to consider the "rule" in Chikwamba v SSHD [2008] UKHL 40. The principle is not confined to cases where children are involved or where the person with whom the appellant is seeking to remain has settled status in the UK. The Judge failed to show how the decision was in the best interests of the child.
18. Nor did the Judge consider the extreme hardship that would be caused to the appellant's family if he were forcefully removed from the UK or if his family were forced to relocate. The child is British and the partner is gainfully employed here.

19. Mr Hussain contended that the Judge did not properly address the provisions of s.117B (6) of the 2002 Act and did not undertake a proper assessment with regard to the best interests of the child.
20. Mr Bramble submitted that it is not a failing of the Judge's determination that she failed to give adequate consideration to the birth of the child to the appellant and his claimed partner.
21. The Judge noted at [32] that the birth post-dated the decision and was a factor that she needed to consider. There was a clear explanation as to why, given the substantial credibility issues, she was not prepared to accept the birth certificate at face value.
22. Mr Bramble referred to [39] of the decision, where she noted that the appellant's sister wrote a letter that her brother, the appellant, lives with her and identified the close relationship he has with her family and the part he plays in the community, but does not refer to the appellant living with his partner and child at all. They are referred to as 'extended family'.
23. Moreover the Judge was informed that the appellant's sister was present but did not give evidence as to why she might have referred to the partner and child as extended family.
24. At [44] the Judge referred to the fact that the appellant's partner is a full-time student. There was a complete absence of any evidence from third parties who might have come into contact with the father and daughter. That was also striking.
25. At [45] the Judge also had regard to inconsistencies in the evidence. The appellant did not mention his grandmother being in Zimbabwe whereas his partner did. He told the Judge that his partner had been to Zimbabwe in the summer of 2015 which should have been shortly before or just after the time they began to live together. The appellant thought it was the year before and described this as simply a visit. His partner however was clear that it was because her grandmother was ill and that she had stayed in Zimbabwe for five weeks. She did not find that this was information that the appellant would not have readily been able to provide, had he been in a genuine and subsisting relationship with his father [45].
26. The Judge noted at [46] that the birth certificate did not show the appellant's name and his partner. Both of them gave an address in Cheshire. The evidence was not satisfactory. The only evidence before the registrar would have been the presence of the couple who must have given information to the registrar of paternity which would have resulted in an automatic registration. There was no evidence that the appellant played any part during the pregnancy or attended scans. There are no records kept by the medical staff. The birth certificate stood alone as evidence of

paternity. In the circumstances the Judge did not find this to be a comprehensive picture in the matter which is satisfactory to establish paternity.

27. Mr Bramble thus submitted that the Judge had not made an error and properly considered the circumstances.
28. In reply Mr Hussain maintained that there was a lack of evidence. The appellant and his partner are still cohabiting. There would also be insurmountable obstacles for his partner's return to Zimbabwe.

### **Assessment**

29. The Judge noted that the respondent's decision pre-dated the birth of the child, (who was born on 17 October 2016). The appellant's application for indefinite leave to remain was refused on 16 July 2015. Thereafter he applied on 13 August 2015 for indefinite leave to remain pursuant to his family and private life in the UK.
30. In the reasons for refusal dated 25 March 2016, It was stated that the parent route under Appendix FM did not apply in his case as he did not have any children in the UK and therefore there would be no insurmountable obstacles to be overcome on his removal.
31. The Judge properly directed herself at [32] that consideration must now be given to the situation in respect of the child, requiring a s.55 assessment.
32. She found that the appellant's explanations that he returned to his sister when things were tight or when he could not work was wholly unsatisfactory. This was completely at odds with his claim to have lived with his partner in Wolverhampton. She had regard at [42] of the documentary evidence relating to the address at 37 Carter Road where his partner claimed to have moved on 15 December 2016. The letter in the bundle at page 16 was given little weight as it is undated, unsigned and said to be from a friend of the appellant's partner. There was no identity information that accompanied the production of that letter. Nor was the witness made available, nor did it make any mention of any address, current events or indeed the appellant's partner is a student [42].
33. The Judge did not find it credible that the appellant continued to use an address in Cheshire as a postal address. The absence of any documentary evidence from him to discharge the burden of proof in respect of that relationship was striking [43].
34. The Judge found the birth certificate relating to the child was insufficient as it did not show the name of the appellant and his partner. Balanced against the remainder of the evidence and the inconsistencies before her, this was not satisfactory. The only evidence before the registrar would have been the presence of the couple who provided information following which there would have been an automatic

registration. Further, there was no evidence that the appellant played any part during the pregnancy. She thus found that the birth certificate stood alone as evidence of paternity and was not in the circumstances satisfactory to establish paternity.

35. The Judge has given a detailed and careful decision setting out the significant inconsistencies with regard to the asserted relationship. In the result she found that the appellant was unable to succeed under the partner route as he was not in a genuine relationship with his claimed partner. Nor could he succeed on the basis of a relationship with the child as there was no satisfactory evidence that she is his daughter [52-53].
36. The Judge has given sustainable reasons for her findings. At the date of hearing there was no DNA evidence produced. The DNA test report was subsequent to the promulgation of the decision.

**Notice of Decision**

The decision of the First-tier Tribunal did not involve the making of an error on a point of law. The decision shall accordingly stand.

Anonymity direction not made.

Signed

Date 20 March 2018

Deputy Upper Tribunal Judge C R Mailer