



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: HU/12137/2016

**THE IMMIGRATION ACTS**

Heard at Field House  
On 20 August 2018

Decision & Reasons Promulgated  
On 6 September 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE SAINI

Between

S T M  
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Representation:**

For the Appellant: Litigant in Person

For the Respondent: Mr C Avery, Senior Presenting Officer

**DECISION AND REASONS**

1. The Appellant appeals against the decision of First-tier Tribunal Judge Graham promulgated on 5<sup>th</sup> September 2017 dismissing his appeal against an application for leave to remain on the basis of his human rights as the partner of a British person and the parent of British children in the UK. The Appellant appealed against that decision and was granted permission to appeal by Upper Tribunal Judge Plimmer in the following terms:

“It is arguable that the First-tier Tribunal failed to take relevant evidence to account my concluding that the Appellant does not play an active role in the light of his

children, evidence that the family unit has resided at the same address (see GP letters at page 18 to 22 of the bundle, other official documents from page 35 and the letter from the Sponsor's landlord regarding the Appellant dated 11<sup>th</sup> April 2016 as referred to in the Appellant's witness statement) and photographic evidence of the family together. These must of course be viewed in the context of the acceptance that the Appellant is the father of the children born in 2014, in 2015, 2016. The youngest child was born under a year before the First-tier Tribunal hearing.

It is also arguable that there was no real inconsistency in the evidence regarding the role the Appellant played in the children's lives (see paragraph 36), and the conclusion that the evidence is vague is arguably inadequately reasoned."

2. I was not provided with a Rule 24 response from the Respondent but was given the indication that the appeal was resisted.
3. The Appellant was unrepresented at the hearing before me. I queried whether he was happy to proceed in the absence of any legal representation and he indicated that he was. As is customary with an unrepresented litigant in person, I asked Mr Avery to make his submissions first which he did and for which I am grateful.

#### **Error of Law**

4. At the close of the hearing I indicated that I found there was an error of law in the decision. My reasons for so finding are as follows.
5. As identified by Upper Tribunal Judge Plimmer in granting permission to appeal it is correct that the assessment the First-tier Tribunal makes of the Appellant's relationship with his partner and of his parental relationship as alleged with his British children does not contain an analysis of the documentary evidence (outlined above in the grant of permission) between paragraphs 33 to 40 of the relevant decision where findings on the same subject matters are made but without mention of that documentary evidence. This is thus a material omission in the First-tier Tribunal's decision.
6. I note that in terms of the latest conviction for the Appellant (which is mentioned at paragraph 34) that the judge had found that there was an error in the oral evidence of the Appellant as to whether or not the partner's cousin was present at the time of the offence. Having considered the matter objectively, in my view, it does not stand to reason that the judge can presume that the partner's cousin was not present at the crime for which the Appellant was convicted given that the cousin was *also* apparently convicted of a crime which involved racial aggravation against the Appellant. Thus, given that both the cousin and Appellant were convicted of an offence that occurred at the same time in front of the children which consists of racial aggravating which is said to emanate from the Appellant's relationship with the cousin of his British partner, and given that they both would have had to be present to commit crimes against each other, it is perverse to state that the Appellant was not present at the crime he committed or the crime he was a victim of. It also begs the question as to why the offence perpetrated against the Appellant would have occurred in the first place if the Appellant was not in a relationship with his alleged (Caucasian) partner as otherwise

there would had to have been another reason for the cousin to have had a racial altercation with the Appellant and a connection with him in the first instance.

7. As also noted by Judge Plimmer, I also take account of the fact that it is not in dispute that the Appellant is the biological father of the three children born in 2014, 2015 and 2016 who are all British citizens. As Judge Plimmer observed the youngest child was born under a year before the First-tier Tribunal hearing. This evidence does go to show that there has, at the very least, been a consistent and consecutive intimate relationship between the British partner and the Appellant, and given those circumstances in the absence of more substantial evidence showing that the relationship does not exist other than those identified in the First-tier Tribunal's decision, in my view it is perverse to dismiss the facts of those consecutive intimate conceptions and births with the same woman and find that the Appellant is not in a genuine relationship with her, and also does not have a genuine relationship with those children either.
8. I also take into account the fact that the Appellant has provided new evidence today that was not before the First-tier Tribunal. As made clear at the outset of the hearing I will not consider that evidence substantively however I have looked at it *de bene esse* in terms of whether there is any evidence that could have illustrated a material difference to the outcome of the appeal had it been provided to the First-tier Tribunal. That evidence does consist of, amongst other materials, photographs of the Appellant with his three children but aside from that evidence from HMRC (which shows that the Appellant has now obtained a national insurance number which I am told with the assistance of his MP which was put in motion before the First-tier Tribunal hearing took place) which demonstrates that he now has formal permission to reside at the same council property with his British partner and children. This is evidence which may have altered the decision of the First-tier Tribunal which the Appellant should have the (final) opportunity to present at a further hearing.
9. I am told by the Appellant that oral evidence was given in relation to this in terms of his inability to reside with his partner consecutively at that property given that he is not permitted to do so which would have previously resulted in a reduction to the benefits the children would have received. The Appellant also told me that in 2015 he did previously put himself down as living in the same property and as a consequence of that the housing benefit was stopped and therefore his name was taken off the record. There is no evidence of the same before me and as such I do not place any weight on these matters.
10. In terms of the photographs and the evidence of the children's education there was also produced (subsequent to the First-tier Tribunal appeal) a letter from Tom Thumb Nursery which confirms and corroborates that the Appellant is responsible for the care of his British children and if it was present before the First-tier Tribunal it may have had a material difference upon the adverse findings as to whether a paternal relationship exists between the Appellant and his children.
11. Although the Appellant was legally represented this material was not put before the First-tier Tribunal and I do take account of what Mr Avery says in that the refusal letter

on page 3 of 8 does mention that there was a failure to provide sufficient evidence that the Appellant resided with a partner. This does not go to the Appellant's credit at all and I was only just persuaded to consider it for myself. However, given that the evidence is independent and not dependent upon the Appellant's testimony (given that he has previous convictions and his testimony was the subject of adverse credibility findings), and notwithstanding that the Appellant was put on notice of the need to provide such evidence and was legally represented, the evidence now produced which I have examined would have been capable of having a material impact upon the outcome of the decision and consequently having considered the evidence *de bene esse*, in my view it does reveal that there was material error of fact in the First-tier Tribunal Judge's decision as it stands (notwithstanding that there is also material as outlined by Judge Plimmer that was not considered).

12. In light of the above findings I set aside the decision of the First-tier Tribunal in its entirety.

### **Notice of Decision**

13. The appeal to the Upper Tribunal is allowed.
14. The appeal is to be remitted to be heard by a differently constituted Bench.

### **Directions**

15. Standard directions are to be given.
16. No interpreter is required.
17. It is anticipated that the Appellant and his British partner will give evidence if not more witnesses.
18. The time estimate for the appeal is 3 hours.
19. The appeal is to be remitted to IAC Birmingham.

### **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 Saini