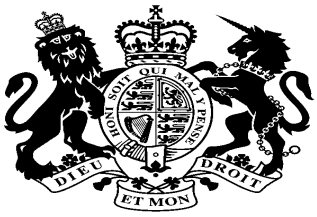

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/01666/2018

THE IMMIGRATION ACTS

Heard at Bradford	**Decision & Reasons promulgated**
on 26 March 2019	**On 1 April 2019**

Before

UPPER TRIBUNAL JUDGE HANSON

Between

CHAUDHRY [M]
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Caswell of Counsel.
For the Respondent: Mr Diwnycz Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appeals with permission a determination of First-tier Tribunal Judge Mensah who in a decision promulgated on 21 December 2018 dismissed the appellant's appeal on human rights grounds.

Background

2. The appellant is a citizen of Pakistan who it is noted by the Judge at [1] sought leave to remain in the United Kingdom on the basis of his family life with his child.
3. The Judge correctly notes this is a human rights appeal setting out details of the appellant's immigration history and findings of fact between [6 – 9] of the decision under challenge in the following terms:

> "6. The appellant entered the UK on the 22 July 2012 on a spouse visa valid until January 2013. On the 29 September 2015 the appellant made a successful application on the basis of family and private life, granted until 10 May 2016. He made further successful application on the same basis granted until 6 March 2017. He made the application relevant to this decision on 7 March 2017. The appellant sought leave to remain in the UK to have a family life with his son [MH] [D.O.B: [~] 2013].
>
> 7. The appellant told me he was divorced from the mother of his child in 2016. The appellant confirmed his son lives with his mother Shazia [B] and he had lived with his son for one year before their marriage ended. He last saw his son in 2015 and through family court proceedings the appellant has established access to his son restricted to sending cards and gifts/clothing. The appellant told me he commenced family court proceedings in 2016 and was granted this indirect access.
>
> 8. The appellant says he is going to seek greater access to his son through the family court but he did not know when this would happen. There is no issue taken with the fact the appellant has a son in the UK. Under the rules he would have to have shown he had a parental relationship with his child. Even on his own evidence he has no direct contact with his son and hasn't for 3 years. He took that matter to the Family court who have determined it is in the child's best interests he remain living with his mother and importantly the appellant be restricted to indirect contact. The appellant has filed copies of a couple of cards he says he sent to his son; who is now 5 years of age. The appellant cannot meet the conditions of paragraph 276 ADE as per the refusal letter and has not raised any very significant obstacles to integration to Pakistan. His entire case is about his relationship with his son. He has spent the majority of his life in Pakistan, he speaks Punjabi and only identified his son as his family in the UK but accepted he has family in Pakistan. He failed to show why he could not integrate. Turning to Article 8 I have considered section 117B of the Immigration Act 2014.
>
> 9. On the current evidence I am not satisfied the appellant has a subsisting parental relationship with his son. He has not seen his son for 3 years and the family court have determined that is in his son's best interests. The appellant may wish to pursue future contact proceedings to increase access to his son but I am considering the position as at the date of the hearing. I find he has failed to show he has an existing family life with his son. However, even if he had shown a very basic family life I would have still refused this appeal as on

> the current evidence it is entirely proportionate for the appellant to return to Pakistan and continue to have the indirect contact he currently is entitled to have. There is no reason he cannot send cards and gift/clothing from Pakistan. I find it far too speculative to accept his intention to pursue family proceedings makes the decision disproportionate on family and private life grounds absent any credible evidence such an application has any merit whatsoever."

4. The appellant sought permission to appeal claiming (a) the decision breached his article 8 rights in the Immigration Act 2014, (b) the decision can be classed as unlawful, (c) is a clear error of law, (d) that not all the evidence was considered, (e) that he has direct contact with his child, and, (f) that he has a direct bond with his child and that his child cannot remain without him.
5. Permission to appeal was granted by another judge of the First-Tier Tribunal in the following terms:

> "The appellant applied for permission to appeal against the decision of Judge of the First-Tier Tribunal Mensah promulgated on 21 December 2018 in which the judge dismissed the appeal on human rights (Article 8) Grounds. The application was made 3 days out of time, the appellant prepared the grounds personally and I have exercised my discretion so as to treat the application as having been made in time. The grounds amounted to no more than a disagreement with the findings of the judge, an attempt to reargue the appeal and they did not disclose an arguable error of law but for which the outcome of the appeal might have been different. Mindful, however, that the appellant is unrepresented, I have considered the Judge's decision in order to ascertain whether it disclosed an arguable error of law but for which the outcome of the appeal might have been different. The judge arguably failed to arrive at findings of fact in circumstances where upon it was incumbent upon her to do so. If paragraph 1 of the skeleton argument on which the appellant relied at the hearing and his witness statement were considered it was plain that in addition to the family life which the appellant maintains with his son (referred to variously as [MM] and [MH]) the appellant was also contending for family life with his current partner, Salam [B] (Mrs [B]) with whom he lives and whom, that the date of the hearing, he was intending to register as his spouse according to an Islamic ceremony. At paragraph 8 of her decision the judge remarked of the appellant, "his entire case is about his relationship with his son". Indeed, nowhere in the judge's decision did the judge refer to the relationship with Mrs [B] for which the appellant contended in the skeleton argument, in the witness statement by way of closing remarks made by the appellant's representative at the hearing. That the appellant did rely on the relationship with Mrs [B] at the hearing was surely conveyed by the judge's Record of Proceedings, the judge noting in the penultimate paragraph of her Record of Proceedings, "current marriage – Salam [B] - 10.8.17 via Islamic ceremony. Living together 10.8.7. She has ILR - see her witness statement". It was arguably incumbent upon the judge to arrive at findings of fact in respect of the appellant's relationship with Mrs [B] and the judge did not do so. The Judge's decision disclosed an arguable error of law but for which the outcome of the appeal might have been different. The application for permission is granted."

6. In his Rule 24 response dated 20 March 2019 the respondent states:

"2. In granting permission to appeal, First Tier Tribunal Judge (FTTJ) Keane found that the grounds prepared by the Appellant did not disclose an arguable error of law in the decision of FTTJ Mensah. However, FTTJ Keane considered it arguable that FTTJ Mensah had erred in failing to consider the Appellant's relationship with Ms Salma [B].

3. The Respondent notes that the decision letter of 13 December 2017 does not mention Ms [B], indicating that the Appellant did not raise this relationship in his application.

4. The Respondent relies on the recent decision in *AK and IK (s.85 NIAA 2002 - new matters) Turkey [2019] UKUT 00067 (IAC),* in which the Upper Tribunal approved the earlier decision in *Mahmud (s.85 NIAA 2002 – 'new matters') [2017] UKUT 000488 (IAC).* The headnote of *AK and IK* reads:

> "*If an appellant relies upon criteria that relate to a different category of the Immigration Rules to make good his Article 8 claim from that relied upon his application for LTR on human rights grounds or in his s.120 statement such that a new judgement falls to be made as to whether or not he satisfies the Immigration Rules, this constitutes a "new matter" within the meaning of s.85(6) of the Nationality, Immigration and Asylum Act 2002 which requires the Secretary of State's consent even if the facts specific to his own case (for example, as to accommodation, maintenance et cetera) remain the same.*"

5. In the Respondent submission, the Appellant's reliance on his relationship with Ms [B] constituted a "new matter". Since the Respondent was not represented at the hearing, consent was not given by the Secretary of State for the FTTJ to consider this "new matter". In the circumstances, the FTTJ had no jurisdiction to consider the "new matter". Consequently, no material error of law arose from the fact that the FTTJ did not consider the relationship between the Appellant and Ms [B]"

Error of law

7. Section 85 of the 2002 Act prevents the Tribunal considering a "new matter" unless the respondent gives consent.
8. There have been a number of recent authorities providing relevant guidance including *Mahmud (S85 NIAA 2002 – "new matters") [2017] UKUT 488 (IAC)* in which it was held:

   (i) Whether something is or is not a 'new matter' goes to the jurisdiction of the First-tier Tribunal in the appeal and the First-tier Tribunal must therefore determine for itself the issue;

   (ii) A 'new matter' is a matter which constitutes a ground of appeal of a kind listed in section 84, as required by section 85(6)(a) of the 2002 Act. Constituting a ground of appeal means that it must contain a matter which could raise or establish a listed ground of appeal. A matter is the factual substance of a claim. A ground of appeal is the legal basis on which the facts in any given matter could form the basis of a challenge to the decision under appeal;

(iii) In practice, a new matter is a factual matrix which has not previously been considered by the Secretary of State in the context of the decision in section 82(1) or a statement made by the appellant under section 120. This requires the matter to be factually distinct from that previously raised by an appellant, as opposed to further or better evidence of an existing matter. The assessment will always be fact sensitive. Examples were given. Where a relationship had previously been relied on and considered by the SSHD then the fact the couple had married would be new evidence but not a new matter. Conversely the fact the couple had a child was likely to be a new matter. Actual consideration in a decision letter of the new factual matrix relied upon is required for a matter not to be a "new matter".

9. *AK and IK (S.85 NIAA 2002 – new matters) Turkey [2019] UKUT 00067 (IAC)* published on 19 February 2019 is the latest judgement on this issue.
10. The appellant's application for leave sought leave to remain on the basis of family life as a parent (10-year route) and on the basis of family/private life outside the Immigration Rules. In the sections of the application form where the appellant is asked to provide details of his application he refers to a covering letter from his legal representatives. At 12.2 he claims his son will not have a relationship with his dad if he is removed but at no point in the application form is Ms [B] mentioned. In the letter from Reiss Solicitors Limited dated 6 March 2017 there is reference only to the proceedings concerning the child and a request for a further period of leave to pursue proceedings in the Family Court with no mention of the person named in the grounds granting permission to appeal.
11. The respondent's refusal dated 13 December 2017 notes the application has been made on the basis of family life with the child. The refusal considered the merits of the application on the basis of the information provided in the application form which was refused and against which the appellant appealed.
12. In section [3] of the application for permission to appeal to the First-Tier Tribunal, received on 28 December 2017 entitled Human Rights Decision, the following is written:

> 3. Please explain why the decision to refuse your human rights claim is unlawful under section 6 of the Human Rights Act 1998. You should specify which article of the Human Rights Act you are appealing under.
>
> *"The decision is wrong as no information was requested: further information was sent to Home Office regarding children matters and also change of circumstances as the appellant has a new partner and documents were sent in support as was extensive correspondence with Social Services. Breach of human rights – article 8."*

13. There is reference to the relationship in the skeleton argument and in submissions made to the Judge.
14. It is not disputed in the appellants grounds of appeal that the relationship with his new partner is an issue that was not raised in the application for leave to remain on human rights grounds. That was, as the Judge correctly records at [8], an application based solely upon the relationship with his son.
15. The appellant was represented at the hearing by Mr M Anwar a solicitor. The Judge's record of Proceedings does not record any application being made for

permission to add in a new matter or any arguments relating thereto on the appellant's behalf. No such permission was therefore granted meaning the only obligation upon the Judge was to consider matters in relation to which she had jurisdiction which was the refusal of the application in relation to the child.

16. Mr Diwnycz confirmed at the hearing that the appellant's appeal bundle was served upon the Secretary of State on 1 November 2018 where, for the first time, there is reference in the skeleton argument relied upon by the appellant of the relationship with Ms [B]. There is no evidence of any application having been made prior to the hearing seeking the respondent's permission to introduce the new matter and, as the Judge noted, as there was no Presenting Officer such could not be sought at the hearing.
17. The submission made on the appellant's behalf that section 85(4) made out the appellant's case as the obligation upon the Judge was to consider all issues at the date of the hearing in a human rights of appeal, not at the date of decision, does not assist, for the matters the Judge was required to consider are only those the First-tier Tribunal had jurisdiction to lawfully consider. Section 85(6) creates a statutory bar to a new matter being considered without the permission of the Secretary of State. Jurisdiction cannot be conferred by mistake, desire or what a person may believe to be a 'Robinson obvious' point. The remedy available to the appellant in relation to his relationship with Ms [B] is to make a fresh application in which he can set out the points he believes entitle him to leave on that basis which can be considered by a decision maker.
18. After further discussion it was accepted by Mr Casswell that there was a jurisdictional bar upon the Judge considering the relationship with Ms [B] which constituted a "new matter" of the type envisaged by section 85(6) of the 2002 Act.
19. No arguable legal error is made out.

Decision

20. There is no material error of law in the Immigration Judge's decision. The determination shall stand.

Anonymity.

21. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

    I make no such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed…….
Upper Tribunal Judge Hanson

Dated the 27th March 2019