Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/11241/2016

THE IMMIGRATION ACTS

Heard at Manchester Civil Justice Centre	**Decision & Reasons Promulgated**
On 26th July 2019	**On 7th August 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE M A HALL

Between

F. O.
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr R Adesina, of Galaxy Law
For the Respondent: Mr C Bates, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction and Background

1. The Appellant appeals against a decision of Judge Mark Davies (the judge) of the First-tier Tribunal (the FTT) promulgated on 29th March 2019.

2. On 15th April 2015 the Appellant made a human rights application for leave to remain in the UK on the basis of his family and private life. The Appellant had been in a relationship with a British citizen to whom I shall refer as AC. They have two children, a son born 11th April 2007 and a daughter born 24th July 2005. The children are British citizens. The

Appellant and AC are no longer in a relationship and there is a restraining order in force prohibiting contact between them.

3. The application for leave to remain was, in the main, based upon the Appellant's relationship with his children. The application was refused on 20th April 2016 and the Appellant appealed to the FTT.

The First-tier Tribunal Hearing

4. The appeal was heard by the judge on 28th February 2007. The decision was to remit the case back to the Respondent to consider section 55 of the Borders, Citizenship and Immigration Act 2009. The Respondent was granted permission to appeal and on 22nd November 2017 the Upper Tribunal found that the FTT had made a material error of law and remitted the appeal back to the FTT to be heard again by the judge.

5. The appeal was heard again by the judge on 1st August 2018 and the hearing adjourned. The family court protocol was engaged. The appeal was heard again on 21st March 2019. The judge heard evidence from the Appellant and his adult stepson TC. The Appellant's evidence was that he was having contact with his minor children with their mother's consent. The mother, AC, had not attended the hearing because of the restraining order which was in force. The Appellant's evidence was to the effect that he had seen his children every weekend since August 2018 and AC was aware of this.

6. TC gave evidence confirming that he took his minor brother and sister to the Appellant's address in March 2018, and had done that three times a month and during the school holidays ever since. He said that AC was aware of this. TC produced letters from his mother, and his sister.

7. The judge found that the Appellant had produced a letter claiming to be from AC dated 15th February 2017 which was a forgery and was not written by her. The judge found that the two letters produced by TC dated 9th February 2019 were forgeries and "in all probability were written by" the Appellant. The judge found that the Appellant's testimony had no credibility whatsoever.

8. The judge concluded that the Appellant was utilising his children to try and prevent his removal from the UK. The judge was satisfied that the Appellant was not having contact with his children and concluded that the Appellant did not have family life with his children which engaged Article 8. The judge found that as Article 8 was not engaged the appeal must be dismissed. In the alternative if Article 8 was engaged, any interference with the Appellant's family life with his children was in accordance with the law in order to maintain effective immigration control, and his removal from the UK would be proportionate.

The Application for Permission to Appeal

9. The Appellant had been unrepresented before the FTT. He instructed representatives to submit an application for permission to appeal.

10. In summary it was submitted that the judge had made inadequate findings and had failed to take into account material evidence.

11. It was submitted that there was a letter from Cheshire West and Chester Council which stated that there was an arrangement agreed for the Appellant to see his children and this was confirmed by TC at the hearing. The date of the letter from the council was not specified in the application for permission to appeal.

12. It was submitted that AC, the mother of the children, had submitted a statement to confirm that the Appellant had contact with his children.

13. Reliance was placed upon the Respondent's policy guidance in which it is stated that strong reasons must be given for a child to leave the UK if the child has resided in the UK for at least seven years. It was pointed out that the children are British and have lived in the UK since birth. It was contended that the judge had failed to consider this policy.

Permission to Appeal

14. Permission to appeal was initially refused by Judge Manuell of the FTT but following a renewed application was granted by Upper Tribunal Judge Lindsley in the following terms;

> "4. It is arguable that the First-tier Tribunal is insufficiently reasoned and perverse with respect to whether the Appellant sees his children, and particularly that there was no consideration of the email from Mr Tom Main, social worker dated 22nd March 2019 which was sent to the Home Office Presenting Officer the day after the hearing which made it clear that there was contact between the Appellant and his children and that social services do not object to that contact if another family member is present – the pattern of contact which arguably had been said to be taking place. It is arguable that this evidence was either available or should have been available to the First-tier Tribunal at the date of promulgation of the decision, and could have materially affected the decision in this case."

My Analysis and Conclusions

15. At the Upper Tribunal hearing Mr Bates advised that he relied upon a response dated 8th July 2019, lodged pursuant to rule 24 of The Tribunal Procedure (Upper Tribunal) Rules 2008. That response indicated that the Respondent accepted that the Grounds of Appeal revealed a material error of law in the First-tier Tribunal Judge's consideration of whether the Appellant had physical contact with his two British children.

16. Consequently the Respondent did not oppose the Appellant's application for permission to appeal and invited the Upper Tribunal to remit the appeal to the FTT for a de novo hearing.

17. Mr Bates advised that he did not seek to depart from the concession that there was a material error of law, but suggested that it may be more appropriate to re-make the decision in the Upper Tribunal. This was on the

basis that there would be very limited fact-finding required. Mr Bates submitted that in re-making the decision the issue to be decided was whether the Appellant had a genuine and subsisting parental relationship with his children. If he did, then his appeal would succeed with reference to section 117B(6) of the Nationality, Immigration and Asylum Act 2002 (the 2002 Act).

18. Mr Adesina advised that he was prepared for the Upper Tribunal to deal with the appeal today, and the Appellant had attended, as had AC and TC to act as witnesses. Because the restraining order remained in force Mr Adesina advised that AC was waiting outside the hearing room, and the Appellant was waiting outside the court building so there would be no contact between them.

19. I decided that the Respondent's concession that the FTT had materially erred in law was rightly made for the following reasons.

20. The judge had before him at the hearing an email from Cheshire West and Chester Council (the council) dated 5th March 2019. This had been produced in response to a request from the Respondent for information as to whether the Appellant was having contact with his two children. The information in the email dated 5th March 2019 was that the Appellant's last contact with the children was in September/October 2018 and AC had stopped contact as she felt the children were being used to support an immigration claim.

21. The judge found, based upon this information, that a letter said to have been written by AC dated 15th February 2017 had been forged by the Appellant. I find this to be an error of law, as inadequate reasoning is given for this conclusion. The letter dated 15th February 2017 was prepared well before contact was said to have been stopped in September/October 2018.

22. The judge also found that two other letters produced at the hearing, one from AC dated 9th February 2019, and the other said to have been written by the Appellant's daughter dated 22nd February 2019, were also forgeries. Again I find that inadequate reasons for this finding have been made. The Respondent in producing the email from the council dated 5th March 2019 had referred to the initial letter from AC, but had not suggested that it was a forgery, but had requested that the Tribunal "treat the letter with caution".

23. I find that there has been an error of law by way of a procedural irregularity. This cannot in any way be attributed to the judge. On 22nd March 2019 the social worker involved in this case, Mr Tom Main, sent an email to the Home Office Presenting Officer. This email disclosed that the children had in fact been seeing the Appellant on a number of occasions in recent months. In other words, the information contained in the email dated 5th March 2019 was incorrect. Mr Main in the email dated 22nd March 2019 confirms that contact has been regular at weekends and

facilitated by the older siblings of the two children, one of whom is TC. Mr Main stated that he and AC had been unaware of this.

24. Mr Main confirmed that AC has subsequently stated that she is happy for the children to have contact with the Appellant so long as there is an older sibling present, and from a social care perspective Mr Main confirmed that the council did not object to the children having contact with the Appellant provided there was another family member present.

25. This email was produced the day after the hearing but before the decision was promulgated on 29th March 2019. It appears that the email, which is clearly material, was not brought to the attention of the judge. I take into account the guidance in MM Sudan [2014] UKUT 00105 (IAC) which confirms that where there is a defect or impropriety of a procedural nature in the proceedings at first instance, this may amount to a material error of law requiring the decision of the FTT to be set aside. A successful appeal is not dependent on the demonstration of some failing on the part of the FTT.

26. I am satisfied that the failure to bring to the attention of the judge the email dated 22nd March 2019 is a defect or impropriety of a procedural nature. This could have had a material effect on the proceedings.

27. For the reasons given above I find that the decision of the FTT discloses a material error of law and is set aside.

28. I was invited to proceed and hear evidence so that the decision could be re-made, and agreed that this would be appropriate. The Appellant's representatives had prepared a further bundle comprising 31 pages and Mr Bates was provided with a copy of this.

29. Both representatives indicated they were ready to proceed. I heard evidence firstly from AC who adopted her witness statement dated 22nd July 2019. She was not questioned by Mr Adesina but was cross-examined by Mr Bates. In answering questions put in cross-examination AC said that she consented to the Appellant having direct contact with the two children. She said that contact must be supervised by TC, and she said that this had been agreed because there was a restraining order in force which meant that she and the Appellant could not be in direct contact with each other.

30. She was asked whether the Appellant made any decisions in relation to the children. She said that this depends. When asked to elaborate she explained that the Appellant is a maths teacher and that he wants to make sure that the children are doing their homework and doing well at school. She said that the children take their homework with them when they visit the Appellant. She confirmed that they have direct contact with the Appellant most weekends.

31. When asked whether the children go to the Appellant's address with TC for contact the reply was in the affirmative. Mr Bates asked that if there was

a problem with the children such as an accident, would AC be content for the Appellant to deal with it, and she replied that she would.

32. Mr Bates indicated that he had no further questions, and in view of the evidence given by AC, that there would be no need to call evidence from the Appellant and TC. Mr Bates stated that he accepted that the Appellant had a genuine and subsisting parental relationship with the children, and that it would not be reasonable for the children to leave the UK and therefore it was conceded that the appeal should be allowed.

33. In my view the concession was rightly made. Only one Ground of Appeal is open to the Appellant in this appeal, and I must decide whether the Respondent's decision is contrary to section 6 of the Human Rights Act 1998. The Appellant relies upon Article 8 of the 1950 Convention in relation to his family life with his children.

34. The burden of proof lies on the Appellant to establish his personal circumstances, and that the decision to refuse his human rights claim interferes disproportionately in his family and private life in this country. It is for the Respondent to establish the public interest factors weighing against the Appellant. The standard of proof is a balance of probabilities throughout.

35. I find that Article 8 is engaged. I must have regard to the considerations in section 117B of the 2002 Act. This confirms that the maintenance of effective immigration controls is in the public interest. The Appellant cannot satisfy the Immigration Rules in order to be granted leave to remain.

36. I set out below section 117B(6);

> "In the case of a person who is not liable to deportation, the public interest does not require the person's removal where –
>
> (a) the person has a genuine and subsisting parental relationship with a qualifying child, and
>
> (b) it would not be reasonable to expect the child to leave the United Kingdom."

37. The Upper Tribunal decision in JG Turkey [2019] UKUT 00072 (IAC) confirms that section 117B(6) of the 2002 Act requires a court or Tribunal to hypothesise that the child in question would leave the United Kingdom, even if this is not likely to be the case, and ask whether it would be reasonable to expect the child to do so.

38. This is relevant in this case, as clearly, even if the Appellant left the UK, the children would not do so. Mr Bates was in my view correct to accept that it would not be reasonable to expect the children to leave the UK. The decisions in KO (Nigeria) [2018] UKSC 53 and AB (Jamaica) and AO (Nigeria) [2019] EWCA Civ 661 confirm that when considering reasonableness the Tribunal must focus on the children, not on the immigration history of the parent.

39. In this case the children are British. They were born in the UK and have always lived here. It cannot be reasonable to expect such children to leave the UK.

40. The other issue relevant in section 117B(6) is whether there is a genuine and subsisting parental relationship. The biological relationship between the Appellant and the children has never been in dispute. It was clear from the answers given by AC, that the Appellant does have contact with his children and does have a genuine and subsisting parental relationship with them.

41. If the requirements of section 117B(6) are satisfied, the public interest does not require the person with the parental relationship with the children to be removed from the UK if that person is not subject to deportation. The Appellant is not subject to deportation. Therefore, for the reasons given, the public interest does not require his removal, and his removal would be a disproportionate interference with his family life rights with his children. On that basis the appeal is allowed.

Notice of Decision

The decision of the FTT contained an error of law and was set aside. I substitute a fresh decision.

The appeal is allowed on human rights grounds with reference to Article 8 of the 1950 Convention.

Anonymity

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 his family. Failure to comply with this direction could lead to contempt of court proceedings. This direction is made because the Appellant's children are minors, and is made pursuant to rule 14 of The Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed Date 28th July 2019

Deputy Upper Tribunal Judge M A Hall

TO THE RESPONDENT
FEE AWARD

I make no fee award. The appeal has been allowed because of evidence considered by the Upper Tribunal which were not before the initial decision maker.

Signed Date 28th July 2019

Deputy Upper Tribunal Judge M A Hall