Upper Tribunal

(Immigration and Asylum Chamber) **Appeal number: HU/08756/2019 (V)**

THE IMMIGRATION ACTS

Heard Remotely at Manchester CJC **Decision & Reasons Promulgated**

On 13 November 2020 **On 17 November 2020**

Before

UPPER TRIBUNAL JUDGE PICKUP

Between

MOHAMMAD [K]

(ANONYMITY ORDER NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the appellant: Mr N Ahmed, instructed by Knightsbridge Solicitors

For the Respondent: Mr S Whitwell, Senior Presenting Officer

DECISION AND REASONS (V)

This has been a remote hearing which has been consented to by the parties. The form of remote hearing was video by Skype (V). A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing. At the conclusion

of the hearing I reserved my decisions and reasons, which I now give. The order made is described at the end of these reasons.

1. The appellant, who is a Pakistani national with date of birth given as 11.4.81, has appealed with permission to the Upper Tribunal against the decision of the First-tier Tribunal promulgated 4.12.19 (Judge Lawrence), dismissing on all grounds his appeal against the decision of the Secretary of State, dated 5.4.19, to refuse his application made on 19.6.18 for entry clearance to the UK, following his deportation and subsequent successful appeal on 20.4.17 against the respondent's refusal to revoke the deportation order.

2. The relevant background can be summarised as follows. The appellant first came to the UK on a spouse visa in 2004, which expired without renewal in September 2006. Despite overstaying, on 3.11.09 he was granted Indefinite Leave to Remain in the UK. His subsequent application for naturalisation was refused on the basis that he had previously overstayed his spouse visa.

3. He was subsequently convicted of two criminal offences, involving dangerous driving and witness intimidation, and sentenced to terms of 8 months' and 6 months' imprisonment. Although the First-tier Tribunal Judge considered that the terms were imposed to run concurrently, the appellant's witness statement states that they were consecutive sentences, which is consistent with the information provided in his application for entry clearance. In any event, in consequence of his criminal offending behaviour, the appellant was made the subject of a deportation order and removed from the UK on 15.6.16. His British citizen spouse and five children, born between 2005 and 2016, remained in the UK.

4. He sought return to the UK and revocation of the deportation order. The First-tier Tribunal decision of 20.4.17 allowed his subsequent appeal against the respondent's refusal to revoke the deportation order, on the basis that the decision disproportionately interfered with the article 8 ECHR rights of the appellant and his family remaining in the UK. In consequence of the Tribunal's decision, on 9.5.18 the respondent revoked the deportation order. Although Mr Ahmed submitted that the appellant should never have been removed from the UK, the appeal was against the refusal to revoke, not the deportation itself.

5. Following his application for entry clearance to the UK made on 19.6.18, the appellant's spouse made a statement withdrawing her support for his application. In the circumstances, his application was refused on the basis that there had been a significant and material change in circumstances since his successful appeal and subsequent revocation of the deportation order. The respondent was not satisfied that he had any family life engaging article 8 ECHR and considered that there was insufficient evidence to render the decision disproportionate.

6. The First-tier Tribunal Judge considering the appellant's appeal against refusal of entry clearance accepted that the appellant is the biological father of the five children referred to but, ultimately, was not satisfied that there was any extant family life between him and either or both his spouse and the children, concluding that there

had been a significant and material change in circumstances since his appeal had been allowed in 2017. No evidence had been adduced of any contact with the children since his departure from the UK, or that he had taken any active role in their upbringing. Indeed, the oral evidence was to the contrary. In the premises, the appeal was dismissed. The judge was satisfied that the appellant did not meet the requirements of the Immigration Rules and that there was no evidence of any compelling circumstances sufficient, exceptionally, to render the respondent's decision unduly harsh.

Basis of the Grant of Permission to Appeal

7. In granting permission to appeal to the Upper Tribunal, the First-tier Tribunal Judge considered that the merit in the grounds is that at [13] of the impugned decision the judge proceeded on the basis that the appellant had not provided a witness statement in support of his appeal, when such a statement, dated 8.11.19, appears at 1.3 of his bundle, prepared for the First-tier Tribunal appeal hearing. This is curious, as it is recorded in the decision that the Home Office Presenting Officer highlighted the absence of such a statement as an important issue when considering the issue of family life between the appellant and his British children. Despite those submissions, the appellant's representative, it does not appear that Mr Ahmed, who also represented the appellant at the First-tier Tribunal, did not attempt to correct the apparent misunderstanding.

8. In granting permission, it was considered arguable that there was insufficient reasoning to explain rejection of the appellant's own evidence (solely contained in his witness statement). Nevertheless, it was noted by the judge granting permission that ultimately this error may not assist the appellant, given the evident changes in circumstances in relation to family life, including the apparent breakdown of the relationship between the appellant and his wife, and the absence of any evidence of contact between the appellant and his children in the UK. In the view of the judge granting permission, the conclusion that the appellant does not enjoy family life with his spouse is unassailable. In relation to the claim of family life between the appellant and the children, the grant of permission considered that the grounds failed to particularise how, even with his witness statement, the outcome could have been any different, or that the judge's conclusion runs contrary to any evidence. However, the judge granting permission did not have access to the witness statement and permission was therefore granted, perhaps as a precaution.

9. I have carefully considered the decision of the First-tier Tribunal in the light of the submissions and the grounds of application for permission to appeal to the Upper Tribunal. The Upper Tribunal has received both Mr Ahmed's skeleton argument, dated 12.11.20, and the Presenting Officer's Minute from the First-tier Tribunal appeal hearing on 12.11.19.

The Appellant's Witness Statement

10. Shortly prior to the First-tier Tribunal appeal hearing, by letter dated 8.11.19, the appellant's representatives sought an adjournment of the remote error of law hearing

in the Upper Tribunal, so that the appellant "should have an opportunity to present himself via video link. This appeal is an extremely sensitive matter relating to his children and it is important that the appellant is allowed to present himself." The letter also asserts that the appellant should have been allowed entry on the basis of his allowed appeal.

11. The adjournment application was refused by the Tribunal Casework on 11.11.19, on the basis that it had been made at a very late stage and without any explanation as to why it could not have been made sooner. It was noted that whether a party should be permitted to give evidence via electronic means is a judicial one and the application could be renewed to be dealt by the judge with as a preliminary matter at the pending appeal hearing. In the event, the application was not renewed, as Mr Ahmed has conceded.

12. The Presenting Officer's Minute also states that prior to the First-tier Tribunal appeal hearing, the appellant's representative sought an adjournment for the appellant to provide a statement, and that this was refused and not renewed at the hearing, with the appeal proceeding with the oral evidence of the appellant's brother and a friend. After hearing Mr Ahmed's submissions, I agree that the Minute is mistaken in suggesting that the application was to enable a statement to be obtained from the appellant. The appellant's bundle was served under cover of letter dated 6.11.19, received by the Tribunal on the afternoon of 11.1.19, the day before the hearing, and was evidently put before the First-tier Tribunal. At [8] of the decision, the judge refers to having taken into account, inter alia, the evidence contained in the appellant's bundle. Crucial to the primary ground of appeal, the bundle contains at [1-3] the witness statement of the appellant, dated 8.11.19.

13. I am satisfied and Mr Whitwell accepts that the judge overlooked the appellant's witness statement. At [15] of the decision, the judge noted that the appeal was entirely predicated on there being family life between the appellant and his children in the UK, stating, "This is a significant issue and accordingly there ought to have been evidence from the appellant in the form of a witness statement, at least." Later in the same paragraph, the judge observed, "The appellant did not seek an adjournment to obtain and submit a witness statement from the appellant." Evidently, no adjournment was necessary, as a witness statement was already in the bundle. It is clear that these statements were made in error of fact.

14. However, more significant than the existence of a witness statement by the appellant, was the extent, if any, of any evidence as to family life with between the appellant and his spouse and/or children; which evidence could have been addressed in a witness statement. At [13] of the decision, the judge stated, "The appellant has not provided a witness statement in (support) of his own appeal." According to the respondent's Minute, at the conclusion of the appeal hearing the Presenting Officer submitted that the appellant had provided "no further evidence with his application regarding his relationship with his children." This is consistent with what the judge recorded at [14] of the decision: "Ms Arif (the presenting officer) highlighted this as an important issue in considering the issue of 'family life' between the appellant and his British children." In summary, there was said to be no up to date information

such as contact between the appellant and his children or what input he has had in making important decisions in the lives of his children. Strictly speaking, that appears to be accurate even when considered against the limited content of the appellant's witness statement.

15. In that witness statement the appellant asserts that he has always had a genuine and subsisting parental relationship with his children. He also stated that he had heard from unnamed other family members that his wife has struggled to cope with caring for the five children and asked other family members for support. His statement suggested that his wife's parents are upset with him and have pressed her to not support his application for entry clearance. Although he does not assert any direct contact with his wife, his statement asserts that unnamed family members have told him that she will reconcile with him once he returns to the UK. This was also asserted by one of the two witnesses called on his behalf.

16. In his statement, the appellant maintains that he has always been a loving father to his children and used to share with his wife the responsibility of ensuring that his son (U) who has a serious medical condition, attended hospital appointments. He complains that he has suffered by losing time being with his children and that they need his physical presence. He affirms that he wishes to return to the UK to ensure the welfare and support of his children, suggesting that it is not in the public interest to leave five British children without their father.

17. It is evident that the witness statement is silent as to the issue of contact or attempted between the appellant and his wife, and more particularly with his children. There certainly was no up to date information about family life, such as contact between the appellant and his children, or what input he has had in making important decisions in the lives of his children. Whilst in his statement he referred to his past role as father and he expressed his future intentions and desires in relation to his wife and children, it in fact contains no evidence of any engagement with the children or involvement in their upbringing, or even participating in any way in the decision-making relating to their lives since he was removed from the UK. It would be reasonable to assume that if any such evidence existed, it would have been adduced. I also note that he does not assert that his wife has prevented or obstructed contact with the children or that anything other than his physical absence from the UK prevents him from making contact with the children. For example, there is no reference to any attempt to telephone or video call the children, or even that he has written to them.

18. The appellant's wife's brief statement withdrawing her sponsorship for his entry clearance application, "due to personal circumstances" is dated 21.3.19 and there is no further explanation. I am satisfied that the judge was entitled to take that as an indication that the relationship between the appellant and his wife had broken down. According to what is recorded at [11] and [12] of the decision, the breakdown was confirmed by Mr Ahmed directly, stating that he accepted that there was no family life between the appellant and his spouse, and that "the appellant's marriage to (his wife) is over." In the grounds and at the hearing before me, Mr Ahmed submitted that no such concession was made by him. However, I pointed out that as counsel he

should be aware that I cannot take evidence from him whilst he continues to represent the appellant. As Mr Whitwell pointed out, the clear case law of Ortega (remittal; bias; parental relationship) [2018] UKUT 00298 (IAC) confirms that there must be a "bright luminous line" between witness and advocate. "An advocate must never assume the role of witness." The procedure for such evidence to be given is clearly set out. Mr Ahmed made no application to adjourn in order to become a witness.

19. It follows that for the purposes of this appeal, I have to proceed on the basis that the concession was clearly made that there was no extant family life between the appellant and his wife. Notwithstanding the concession, at the First-tier Tribunal Mr Ahmed maintained that refusal of entry clearance was a disproportionate "breach" of the appellant's right to enjoy family life with his children. At [12] it is recorded that Mr Ahmed "accepts that the appellant's marriage to (his wife) is over," but went on to submit that until there is a decree of divorce, they continue to enjoy 'family life' with each other. For obvious reasons, the judge rejected that submission. I am satisfied that the concession recorded renders much of Mr Ahmed's further submissions to the First-tier Tribunal and to me on this point untenable, including that pressure had been brought to bear on the wife to make that statement and that family life was continuing. Notwithstanding, Mr Ahmed continued to pursue the point before me, which I reject. Given the concession, those submissions cannot be entertained in this appeal.

20. In any event, as the First-tier Tribunal Judge pointed out, the issue for the First-tier Tribunal was whether was family life as of that date. Given the clear change of circumstances and the absence of any positive and up to date evidence of a relationship or contact, or even attempted contact, between the appellant and his wife or his children, I am not satisfied that even without the concession the overlooked witness statement of the appellant would or could have made any difference to the outcome of the appeal. The wife's withdrawal of support and the lack of evidence of contact between the appellant and his family since his removal from the UK, more than four years ago, was certainly sufficient for the judge to conclude that family life does not continue between them, even if he harbours hope that one day it might somehow be revived. It follows that insofar as there was an error in overlooking the appellant's witness statement, I am satisfied that the error was immaterial. The failure did not amount to procedural unfairness and does not render the findings of the First-tier Tribunal legally flawed.

21. The judge also rejected Mr Ahmed's submissions that that the finding of the previous judge in allowing the appellant's appeal to the effect that there was family life between the appellant and his spouse and children should be accepted at face value. This is repeated in the grounds asserting that pursuant to Devaseelan (Second Appeals - ECHR - Extra-territorial Effect) Sri Lanka [2002] UKAIT 00702, that the judge should have taken the previous findings of family life as the starting point and that there was "no evidence before the FTTJ to support any conclusion of family life having been terminated between the appellant and his children." This submission was repeated by Mr Ahmed in his submissions to me. In this regard, I find that the

grounds and submissions are flying in the face of the evidence and in particular the lack of evidence of a continuing relationship. It follows that the position taken that there was no evidence that the marriage had permanently broken down is unsustainable.

22. Similarly, I am satisfied that the assertion in the grounds that the judge failed to "take into consideration the full background to the marriage and also the issues surrounding medial (sic) health issues around his partner and also lack of support/pressure from her imminent (sic) family of appellant's partner," has no merit. Whilst the appellant's brother's statement was that the spouse was being pressured by her family to "stay away" and would support the appellant once he had returned to the UK, was part of the evidence the judge confirmed to have taken into account, it was open to the judge to find that there was no such relationship. As stated, the concession made renders the pursuit of this argument before me unsustainable.

23. With regard to family life with the children, the judge noted at [16] of the decision that the witnesses confirmed that the appellant had not been in touch with any of his children. This was clear evidence, unchallenged in the grounds, in the light of which a claim of continuing family life with the children is difficult to sustain. In effect, this ground is no more than a disagreement with the decision and does not disclose any error of law. In Herrera v SSHD [2018] EWCA Civ 412, the Court of Appeal said that it is necessary to guard against the temptation to characterise as errors of law what are in truth no more than disagreements about the weight to be given to different factors, particularly if the judge who decided the appeal had the advantage of hearing oral evidence. It is well-established law that the weight to be given to any particular factor in an appeal is a matter for the judge and will rarely give rise to an error of law, see Green (Article 8 -new rules) [2013] UKUT 254.

24. The grounds also argue that "there was no evidence before the FTTJ to support any conclusion that the appellant's partner would not facilitate contact between the appellant and children." Here the grounds seek to convert the absence of evidence into evidence in support of family life. Once again, this is a mere disagreement with the decision.

25. The grounds also argue, as did Mr Ahmed at the First-tier Tribunal appeal hearing, that the effect of the human rights appeal being allowed by the Tribunal in 2017 established his right to enter and remain in the UK without making an entry clearance application, so that the respondent was obliged to facilitate his entry and the refusal to do so was unlawful. As the judge pointed out to Mr Ahmed, this submission is misguided. "It is not for the First-tier Tribunal to 'rule' on whether the Secretary of State for the Home Dept should facilitate the appellant's return to the UK without the appellant making an application for entry clearance." As the judge pointed out at [10] of the decision, that is a matter for judicial review not the First-tier Tribunal. This ground was not pursued by Mr Ahmed before me.

26. Mr Ahmed did seek to pursue private life grounds, but apart from being mentioned in the grounds of appeal, this does not appear from the impugned decision to have to

been pursued at the First-tier Tribunal. In any event, the claim is without merit given that the appellant has been absent from the UK for more than 4 years and must have a private life in Pakistan. Any argument that the refusal of entry clearance infringes his article 8 rights to a private life is doomed to failure.

27. Clearly, as indicated above, there have been significant and far reaching changes in circumstances since the previous Tribunal decision was made in 2017 finding family life continued with the spouse and children. The judge was entitled to consider the evidence overall and in particular the lack of positive evidence of a continuing relationship. With respect to Mr Ahmed, the overlooked witness statement does not take the appellant's case any further. I am satisfied that on the positive evidence that the appellant has had no contact with his children and that his wife does not support his return to the UK, together with the lack of evidence in support of any family life continuing, independently of the issue as to whether the judge mis-recorded Mr Ahmed's submissions or overlooked the appellant's witness statement, the finding that there is no family life between the appellant and his wife or with his children is one which is unassailable and no error of law is disclosed. As Mr Whitwell pointed out, if there is no family life, then article 8 is not engaged and the issue of proportionality of the decision does not arise. Neither are there compelling or exceptional grounds on the limited facts of this case to justify granting entry clearance outside the Rules.

28. In the circumstances and for the reasons set out above, I find no material error of law in the decision of the First-tier Tribunal so that it must be set aside.

Decision

The appellant's appeal to the Upper Tribunal is dismissed.

The decision of the First-tier Tribunal stands and the human rights appeal is dismissed.

I make no order for costs.

Signed: *DMW Pickup*

Upper Tribunal Judge Pickup

Date: 13 November 2020