



IAC-AH-SAR-V1

**Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/18416/2019**

THE IMMIGRATION ACTS

**Heard at Field House
On the 26 May 2022**

**Decision & Reasons Promulgated
On the 08 September 2022**

Before

UPPER TRIBUNAL JUDGE LANE

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**MR HAIDA
(ANONYMITY DIRECTION NOT MADE)**

Respondent

Representation:

For the Appellant: Mr Whitwell, Senior Home Office Presenting Officer

For the Respondent: Not Present or represented

DECISION AND REASONS

1. I shall refer to the appellant as the 'respondent' and the respondent as the 'appellant', as they appeared respectively before the First-tier Tribunal.
2. The Tribunal has been seriously hampered in determining this appeal by the absence of the documents which were before the First-tier Tribunal. I have asked for these to be located and sent to me but have not received a bundle of documents. I heard Mr Whitwell, Senior Presenting Officer, at an initial hearing at Field House on 26 May 2022. There was no appearance on behalf of the appellant although the reasons for that are explained below.

3. Fortunately, the administrative difficulties encountered by the Upper Tribunal need not prevent the disposal of this appeal. One document which I have received is an email from Mr Farhat of Gulbenkian Andonian, solicitors for the appellant. Given the unusual circumstances, I set out that email below in full:

Dear Upper Tribunal Judge Lane and Dear Mr. Whitwell (representing the SSHD),

My name is Fadi Farhat (at Gulbenkian Andonian Solicitors).

I have just received Mr. Whitwell's Addendum Grounds.

I represented Mr. Haida in the proceedings at the First-tier Tribunal (although I did not prepare his original application for leave to remain and I only came on board for the appeal).

As you will note, on appeal, it was argued that Mr. Haida had a "parental relationship" with his niece and nephew through "stepping into the shoes" of a de facto father and, therefore, he would qualify under the provisions of Appendix FM (EX.1).

Gulbenkian Andonian Solicitors represented Mr. Haida on a pro-bono basis and have done so during the course of the proceedings and continue to do so.

When this Error-of-Law hearing was listed for 26th May 2022, my colleague made an application for the matter to be listed for a hybrid hearing to enable me to appear remotely as I am currently in Doha, Qatar (in relation to an assignment matter surrounding compliance at this year's World Cup with regard to fan inclusion on minority groups). This Qatari assignment was unavoidable and had been postponed from late 2020 and, again, in April 2021, due to Covid-19.

At the same time, we have not been able to procure alternative Counsel to appear on behalf of Mr. Haida on a pro-bono basis.

I have read the SSHD's Addendum document. I do see the point which is being made in the Addendum document. In fact, although not noted in the First-tier Tribunal's determination, I did raise this point at the outset of the FtT's hearing. I raised it as a point and even advised the Appellant, before hand, that the more appropriate course of action would be to make a fresh application pleading the "parental relationship" point in order to meet the gateway point referred to in Mr. Whitwell's Addendum document.

Somehow, what I said at the outset of the FtT's hearing was interpreted (by both the presiding Judge and the HOPO) as being a "new matter" requiring SSHD consent. The First-tier Tribunal Judge asked the presiding HOPO if the SSHD would give her consent to the so-called "new matter" and the HOPO indicated that he was happy to proceed and continue on that day without an adjournment.

I then left it at that because all parties (the presiding Judge and the HOPO) were very content to proceed and it seemed odd that I, as the Appellant's

representative, was making a point to put a halt to the appeal altogether when others wanted to proceed.

I did not, at the time, think that the pleading in relation to Mr. Haida fell for consideration under the legal framework of "new matter" but, rather, it was a gateway matter in the sense that the Tribunal could not be a primary decision-maker on a matter which did not make it through the valid application gateway.

Thus, for example, where one makes an application on the basis of Family Life as a Partner and, by the date of hearing, the British Sponsor has given birth to a Qualifying Child, the issue of the Qualifying Child becomes a "new matter". However, the appellant would have, at least, passed through the application gateway by having made an application on Family Life grounds in the first place (irrespective of the developing scope of that Family Life).

In this case, Mr. Haida did not, in the first instance, make an application on the grounds of Family Life (i.e. the gateway to which Mr. Whitwell refers). So, I do agree with Mr. Whitwell's analysis and wish to emphasise that I did raise it at the outset in the First-tier Tribunal as a preliminary matter but what I said was seemingly misinterpreted or conflated with "new matter" framework.

If the Upper Tribunal accepts Mr. Whitwell's analysis (with which I agree and it appears that we have some sort of consensual front on this point), it follows that, in merely considering a line of submission or pleading as primary decision-maker without a basis for doing so through lack of any valid application on the basis of Family Life, the Tribunal's decision embodies an error of law. The appeal stands to be dismissed or, rather, remains dismissed on the basis of the findings on Private Life (which was the application that Mr. Haida made) which need not be disturbed.

The result is (as I had intimated in the first place) that it would then be up to Mr. Haida to make a fresh and valid fee-paid application on the grounds of Family Life where he can plead his "parental relationship" and the SSHD can consider that as the primary decision-maker with, if applicable, any onward right of appeal.

However, this would mean that, by the same token, it would not be open to the Upper Tribunal to set aside or make findings on the "parental relationship" point. That would be up to and for the SSHD to decide in the first instance in the context of any fresh application made to her. It would prejudice that application and, indeed, the role of the SSHD (given Mr. Whitwell's [correct] stance that the SSHD should be the primary decision-maker on such a matter) if the Upper Tribunal were to provide any input on that line of pleading at this stage.

In conclusion, the Appellant concedes the point made by the SSHD's Addendum document such that the appeal remains dismissed on the First-tier Tribunal's reasoning on Private Life (with those findings preserved) as an application was only made on the grounds of Private Life and it is this aspect which filtered through the gateway referenced by Mr. Whitwell.

As stated, it would be up to Mr. Haida (finances permitting and/or through an application for a fee waiver) to make a valid application on Family Life grounds.

If, for whatever reason, the Upper Tribunal is not in agreement with the apparent consensual front put forward by Mr. Whitwell and myself and decides to delve into an analysis or consideration of the Judge of the First-tier Tribunal's reasoning on the issue of "parental relationship", the Appellant has provided written submissions on this point as far back as September 2020 and hereby relies on those submissions.

Lastly, I do apologise to the Tribunal for my lack of attendance. An application had been made for a hybrid hearing to secure my attendance remotely but this was refused for reasons which I and Gulbenkian Andonian Solicitors entirely respect.

I simply wish to reiterate that no disrespect is intended at all through my lack of attendance and that I am currently on a short assignment in Qatar and this assignment started shortly before I was even given notice of the hearing on this matter (i.e. the hearing of 26th May 2022). As stated, we have been unable to procure alternative Counsel on a pro-bono basis; that has appeared to be tricky in these challenging times.

I thank Upper Tribunal Judge Lane and Mr. Whitwell for their respected readership of this matter.

[My emphasis]

4. I am grateful to Mr Farhat for setting out the appellant's position so clearly. His account of the Secretary of State's arguments coincides with my record of proceedings of the initial hearing and the submissions made by Mr Whitwell.
5. In the circumstances, the Secretary of State's appeal is allowed. The findings of fact of the First-tier Tribunal as to the appellant's private life are preserved. The decision is remade dismissing the appellant's appeal against the decision of the Secretary of State.

Notice of Decision

The Secretary of State's appeal is allowed. The findings of fact of the First-tier Tribunal as to the appellant's private life are preserved. The decision is remade dismissing the appellant's appeal against the decision of the Secretary of State.

Signed
Date 10 August 2022
Upper Tribunal Judge Lane

