Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/00697/2020
HU/50147/2020, (UI-2021-001205)

THE IMMIGRATION ACTS

Heard at : Field House	**Decision & Reasons Promulgated**
On : 13 June 2022	**On : 15 July 2022**

Before

UPPER TRIBUNAL JUDGE KEBEDE

Between

H M P
(ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr N Sadeghi, Counsel (Legis Chambers)
For the Respondent: Mr E Tufan, Senior Home Office Presenting Officer

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, anonymity is granted in relation to the appellant's children. No-one shall publish or reveal any information, including the name or address of the appellant's children, likely to lead members of the public to identify the appellant's children. Failure to comply with this order could amount to a contempt of court.

DECISION AND REASONS

1. The appellant is a citizen of India, born on 19 November 1984. He has been given permission to appeal against the decision of First-tier Tribunal Raymond dismissing his appeal against the respondent's decision to refuse his application for leave to remain on human rights grounds.

2. The appellant entered the United Kingdom on 2 November 2009 as a dependent partner on a Tier 4 student visa valid until 31 May 2011. He was granted further periods of leave on the same basis until 5 December 2016, but his leave was curtailed on 17 July 2014 to expire on 20 September 2014 when his wife's sponsoring college had its licence revoked. His application for further leave was refused and his appeal against that decision was dismissed by the First-tier Tribunal on 9 December 2016. He became appeal rights exhausted on 14 September 2017. On 27 September 2017 he applied for leave to remain in the UK on private and family life grounds, but his application was refused with an out of country right of appeal. A further application made on the same basis on 20 November 2018 was rejected, as was an application made outside the immigration rules on 21 December 2018 which was rejected on 10 September 2019.

3. On 27 September 2019 the appellant made a further application for leave to remain outside the immigration rules. Further representations were made by his representatives on 17 January 2020 in support of the application, referring to the significant change in circumstances since the appeal before the First-tier Tribunal, namely that the appellant's marriage had broken down, his wife had moved out of the matrimonial home and had denied him access to his children, he had heard that his wife and children had been granted leave to remain and that he was now in the process of instituting family law proceedings through the Family Courts to establish contact with his children. It was submitted that the appellant had a genuine and subsisting relationship with his children and that it would be a breach of Article 8 of the ECHR if he was removed to India in light of the family and private life he had established in the UK.

4. The appellant's application was refused on 29 June 2020. The respondent considered that the appellant was not eligible to apply as a parent under Appendix FM because his children were not British, they were not settled in the UK and they had not lived in the UK for seven years. The respondent considered that, with respect to the appellant's private life, he could not demonstrate that there were any very significant obstacles to integration in India for the purposes of paragraph 276ADE(1)(vi). The respondent considered further that there were no exceptional circumstances rendering refusal a breach of Article 8 on the basis of unjustifiably harsh consequences. The respondent noted that there was no evidence that the appellant's wife and children had been granted leave to remain in the UK and there was no evidence that the appellant was seeking formal contact with his children through the Family Courts.

5. The appellant appealed against that decision and his appeal came before First-tier Tribunal Judge Raymond on 27 April 2021. He confirmed, in a statement for the appeal, that he and his wife had two sons born in the UK, in 2014 and 2017. Although his wife had left the matrimonial home, he was trying

to reconcile with her, and no divorce proceedings had commenced. He understood from friends that his children were missing him and were being prevented from contacting him by his wife. He had been living off friends for the past three years. He lacked work experience and education and would have difficulty finding work in India. He had no support there as his father had died in November 2017 and his mother was elderly.

6. The appellant gave oral evidence before the judge, confirming that he had separated from his wife on 19 February 2019 and since then had had contact with the children by telephone once or twice a month and had seen them once for three hours on 3 April 2021 and last spoke to them on 24 April 2021. He and his wife were going to mediation to try to reconcile and that had started on 19 January 2021 and was through the courts, but his wife had not attended despite being called 50 to 60 times. He relied on a letter from Family and Partner Mediation (MIAM) and stated that he had started the proceedings because he wanted to see his children. He was asked in cross-examination about a police caution which had been issued against him and he said that his wife had complained that he had assaulted her and had gone to the police. She was having an affair with someone else.

7. In the absence of any supporting evidence, the judge did not accept the claim that the appellant had been told by his wife that she had acquired leave to remain. He did not find the appellant to be a credible witness. He found the appellant to be evasive when asked about the police caution, noting that there was no need to him to have been so since he was not charged with an offence in any event. He considered that the appellant had been untruthful about a lack of support in India, noting that he had given inconsistent evidence about his father and that his brother and sister were living there. The judge considered that the best interests of the children lay in remaining with their mother and having indirect contact with their father in India. He noted that the appellant had not bothered to make any family court application for contact with his sons and had instead spent his time making unmeritorious immigration applications for himself. The judge found that the appellant had not demonstrated that there were very significant obstacles to his integration in India for the purposes of paragraph 276ADE(1)(vi) of the immigration rules and that there were no compelling circumstances outside the immigration rules under Article 8. He accordingly dismissed the appeal.

8. The appellant was initially refused permission to appeal to the Upper Tribunal. He renewed his application to the Upper Tribunal Judge on the following grounds: firstly, that the judge had made a mistake of fact by relying upon the appellant’s criminality and referring to a caution, when in fact there was no caution or criminal conduct and that he had therefore given weight to an immaterial matter and made an irrational finding; secondly, that the judge’s assessment of, and findings on, the best interests of the appellant’s sons were ambiguous and fundamentally flawed and the judge had misunderstood the step taken by the appellant in family law proceedings; and thirdly, that the judge’s adverse credibility finding was without foundation.

9. Permission was granted by UTJ Owens on 4 February 2022 on the following basis:

> "2. It is arguable that the judge made a mistake of fact when finding at [42] that the appellant assaulted his children's mother in their home and that this fed into his assessments of credibility and the best interests of the children. It is also arguable that the judge failed to appreciate that the Mediation Information and Assessment Meeting referred to at [25] was a compulsory step before issuing court proceedings.
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> 3. The appellant is on notice that although there is arguable unlawfulness in the decision that he will need to demonstrate that these errors are material to the outcome of the appeal, given that there was insufficient evidence before the judge that his estranged wife and children had been granted status in the UK and limited evidence that he continues to have family life with his children.
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> 4. All grounds are arguable."

10. The matter was then listed for hearing and came before me. Mr Sadeghi produced a supplementary skeleton argument and raised some preliminary matters. He advised the Tribunal that the appellant had since commenced proceedings in the family courts for contact with his children and requested an anonymity order in respect of the children. He also invited the Tribunal, pursuant to rule 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008 to consider the information and evidence available in relation to those proceedings, insofar as it was disclosable at this stage, since it went to the materiality of any errors made by the judge, as referred to by UTJ Owens in her grant of permission.

11. With regard to the former, there was no objection by Mr Tufan and the order was granted. With regard to the latter, I did not consider it appropriate, at this stage of the proceedings, to admit evidence relating to family law proceedings which had not been instigated at the time of the appeal before Judge Raymond. Mr Sadeghi agreed with my suggestion that an appropriate course would be for the appellant to make a fresh application in light of the change of circumstances, but he nevertheless wished to pursue the grounds of appeal challenging Judge Raymond's decision. Mr Tufan also helpfully offered information that the appellant's wife and children had been granted discretionary leave to remain on 26 November 2020.

12. Both parties then made submissions before me, which I shall address in the discussion below.

Consideration and Findings

13. The first ground was in relation to Judge's Raymond's reference to, and reliance upon, the appellant's criminality, when he had not been charged with a criminal offence. It was submitted that the judge had referred at [39] and [42] to a police caution, whereas there was no evidence, such as a PNC record, of a caution having been issued, and rather there was evidence that there had been no offence committed. Mr Sadeghi relied upon the last page of the

appellant's bundle before the First-tier Tribunal, the police custody record, in that respect, and submitted that the judge had made a mistake of fact leading to unfairness in the proceedings and a material error of law.

14. However, as Mr Tufan pointed out, it was the appellant's own evidence that he had a caution issued against him. That evidence was the entry at page 5 of 9 of the appellant's leave to remain application form, at page A5 of the Home Office bundle, and in his own appeal bundle at page 29, which was before the First-tier Tribunal, which specifically referred to a caution having been issued on 19 October 2018 for 'assault by beating'. Judge Raymond was perfectly aware that that had been qualified by the appellant's solicitor's statement, in their covering letter of 17 January 2020, that the appellant was arrested after his wife accused him of domestic violence but he was not charged with an offence, as referred to at [5] of his decision. He was also perfectly aware that the document at the end of the appellant's appeal bundle, the police custody record, confirmed that there had been no charge, as he observed at [39]. Clearly there was no mistake of fact by the judge, who was fully aware of the extent of the 'offence'. He was entitled to have regard to the appellant's own evidence, which has not been undermined by any evidence to the contrary, and there is no indication that he accorded undue weight to the incident, or acted unfairly, such that it materially affected his overall decision.

15. Contrary to the assertion in the second ground, I see no contradiction in the judge's findings at [42] in relation to the best interests of the appellant's children. It is plain that the conclusion the judge reached was that the children's interests were best served by remaining with their mother, with there being no requirement for direct contact with the appellant, a conclusion which was entirely open to him on the basis of the limited evidence of past contact between the appellant and his sons. Whilst the judge could perhaps have expressed himself in clearer terms, nothing material arises from this. The judge was fully aware that the appellant was claiming that his children's mother was preventing contact, as he recorded at [15], but that was a matter he then addressed at [43] where he noted the lack of effort made by the appellant to pursue contact through legal proceedings. Likewise, nothing material arises from the judge's reference at [44] to MIAM being an organisation, when it is clear that he understood the appellant's evidence to be that he had since initiated mediation through MIAM. He simply did not believe the appellant's account of the mediation services having contacted his wife so many times, which was consistent with his overall adverse findings on the reliability of the appellant's evidence. As for the challenge to the judge's reference at [43] to the appellant putting effort into regularising his own immigration status without focussing on pursuing contact with his children, it seems to me that the judge was entitled to draw the adverse conclusions he did in that regard. The evidence before the judge was that the appellant had made no applications for contact with his children in the two years since his wife left him in February 2019, the application for mediation having been made only in January 2021 and had seen his children only once more than two years later in April 2021, whereas he had made efforts to seek leave to remain in the UK during that period of time. The findings he made were entirely consistent with that chronology.

16. Finally, the grounds challenge the judge's adverse credibility findings. However, it seems to me that those were findings open to the judge on the evidence before him. The judge was entitled to consider that the appellant's claim to have no support in India - his father having died in November 2017 and his mother being elderly - was inconsistent with the information provided in his application form completed on 27 September 2019, that his parents remained living in India. In so far as the grounds at [20] appear to suggest that the judge made adverse credibility findings about the appellant based on his use of a Hindi interpreter despite asserting he spoke some English, that is plainly misconceived, since [19] was simply a record of the proceedings and was clearly not a finding, let alone an adverse credibility finding. Likewise, the grounds are misconceived where they assert at [22] that the judge made a mistake of fact when drawing adverse conclusions from the appellant providing his marital address in his application form despite having separated from his wife. The appellant's evidence before the judge, as recorded at [20], was that he had separated from his wife on 19 February 2019, whereas his application form was completed on 27 September 2019. The address provided by the appellant for himself and his wife in the application form was therefore inconsistent with his oral evidence that they had separated by that time. The judge therefore made no mistake of fact, but made a finding based on the evidence and was entitled to draw the adverse conclusion that he did in that regard. The other credibility challenges raised in the grounds have already been addressed above.

17. Accordingly, it seems to me that the judge was fully and properly entitled to make the adverse findings that he did. His findings took account of all the evidence. Aside from the appellant's oral evidence, the only evidence produced by the appellant of a parental relationship with his sons consisted of letters from the family GP and the eldest's son's school confirming that both parents were listed as contacts and that both had attended the surgery with their eldest child. Both letters were dated prior to the appellant and his wife separating and, as the respondent properly submitted, they did not amount to evidence of a subsisting parental relationship. The judge had full regard to the appellant's explanation for the limited evidence of parental contact, namely contact being prevented by his wife, but provided cogent reasons for according the weight that he did to that explanation. On the basis of the very limited evidence before him, and for the reasons fully and properly given, the judge was entitled to reach the decision that he did and to conclude that the appellant's removal from the UK would not breach his Article 8 rights. The fact that it has now been clarified that the appellant's wife and children have been granted discretionary leave, and the fact that family court proceedings have since been instigated by the appellant do not, in my view, undermine the decision made by the judge on the evidence he had before him. Should circumstances materially change as a result of those proceedings, that would no doubt form the basis of another application, but it is not a reason to find that Judge Raymond erred in law in his decision at that time.

18. For all of these reasons I find no merit in the grounds and I uphold the decision of the First-tier Tribunal.

DECISION

19. The making of the decision of the First-tier Tribunal did not involve an error on a point of law requiring it to be set aside. The decision to dismiss the appeal stands.

Signed S Kebede
Upper Tribunal Judge Kebede Dated: 15 June 2022