



**IN THE UPPER TRIBUNAL**  
**IMMIGRATION AND ASYLUM**  
**CHAMBER**

**Case No: UI-2022-006472**  
**First-tier Tribunal No:**  
**HU/51628/2022**

**THE IMMIGRATION ACTS**

**Decision & Reasons Issued:**  
**On the 14 May 2023**

**Before**

**UPPER TRIBUNAL JUDGE O'CALLAGHAN**

**Between**

**KHALID EL JOUTI**  
(NO ANONYMITY ORDER MADE)

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Mr Z Nasim, Counsel, instructed by Legal Rights Partnership

For the Respondent: Mr T Melvin, Senior Presenting Officer

**Heard at Field House on 4 May 2023**

**DECISION AND REASONS**

**Introduction**

1. The appellant appeals with permission against a decision of Judge of the First-tier Tribunal Raymond ('the Judge') dismissing his human rights (article 8 ECHR) appeal. The Judge's decision was sent to the parties on 8 November 2022.

**Brief Facts**

2. The appellant is a national of Morocco and is aged 34. He married his former wife, a British citizen, in 2016, and subsequently secured entry

clearance. He was granted leave to remain in this country from 29 November 2020 until 19 June 2023.

3. He separated from his wife and on 19 April 2021 applied for leave to remain as a parent under the Immigration Rules. The respondent refused the application by a decision dated 25 February 2022, concluding that the appellant did not meet the requirements of paragraph E-LTRPT.2.2(b) of the Rules. The representatives at the hearing before me acknowledged that the reference to this paragraph in the decision letter was erroneous, as the reasons cited related to paragraph E-LTRPT.2.4(b). In any event, the decision detailed:

‘It has previously been accepted that you are [a] parent to a British child and that you played an active role in the child’s upbringing, however, since separating from your partner you have shown insufficient evidence to support that you continue to play an active role in your child’s life and therefore, you do not meet the requirements for a grant of leave under the parent route.’

4. The respondent reasoned in respect of of paragraph EX.1.(a) of the Rules:

‘You have told us you have a parental relationship with [appellant’s child] in the UK. However, paragraph EX.1.(a) of Appendix FM does not apply in your case because you are no longer in a relationship with your partner and you have shown insufficient evidence to support that you have a genuine and continued relationship with your British child.’

5. As to private life under article 8 ECHR, the respondent decided:

‘We do not accept that there would be very significant obstacles to your integration into Morocco if you were required to leave the UK because you have stated in your application that you speak Arabic which is widely spoken in Morocco and this will help you to adapt to life in Morocco, socially and culturally.’

6. The respondent further concluded that no exceptional circumstances arose.

7. The appeal came before the Judge sitting at Nottingham Justice Centre on 14 October 2022. The appellant attended and was represented by Mr Nasim, Counsel, who also represented him before the Upper Tribunal.

### **Ground of appeal**

8. The appellant advances four grounds of appeal, which are detailed over six pages. The grounds can properly be identified as:

- (i) The First-tier Tribunal erred in its assessment as to the appellant’s ability to meet the requirements of the Immigration Rules.
- (ii) The First-tier Tribunal acted with procedural unfairness by making adverse findings as to evidence by not putting concerns to the appellant during the hearing.

(iii) The First-tier Tribunal made irrational or perverse findings.

(iv) The First-tier Tribunal erred in the approach it adopted to section 117B(6) of the Nationality, Immigration and Asylum Act 2002.

9. Permission to appeal was granted by Judge of the First-tier Tribunal Clarke on 10 March 2023. Judge Clarke reasoned, *inter alia*:

‘3. It is arguable that the Judge erred by finding that while the Appellant has had contact with his daughter in the past, he proceeded to find that in the past the Appellant has not taken an active role in his daughter’s life or intends to continue to take an active role in her upbringing.

4. It is also arguable that the Judge has failed to make adequate reasons as to why ongoing contact does not mean that the Appellant has a genuine and subsisting parental relationship with his daughter. It is also arguable that the Judge’s findings on a lack of an active role in his daughter’s life or any parental relationship are inconsistent with what the Judge referred to as the voluminous social media messages between the Appellant and his estranged wife which related in part to contact arrangements.

5. Furthermore, it is arguable that the Judge made findings on the Appellant’s bank statements to conclude that the Appellant’s focus was on his social circle and not his daughter in circumstances where it is alleged these points were not put to the Appellant during the hearing.’

## **Discussion**

10. I was aided by a very helpful and detailed skeleton argument prepared by Mr Melvin. However, for the reasons detailed below, I concluded at the hearing that the decision of the First-tier Tribunal suffered from a material error of law and was properly to be set aside.

11. Mr Nasim identified on behalf of the appellant that ground 2 was the strongest challenge to the First-tier Tribunal’s decision. Complaint is made that the Judge proceeded of his own volition, post-hearing, to conduct a forensic analysis of the appellant’s banking transactions, concluding that the transactions placed him in London on an almost weekly basis, and so established a lack of connection with his daughter. Complaint is also made that the Judge did not raise these issues during the hearing or give the appellant an opportunity to respond to these issues of concern.

12. The appellant is properly to be aware that he submitted the evidence and relied upon it. Any clear and obvious issues of concern arising are a matter for an appellant to address and a judge is permitted to proceed to give careful and thorough consideration to such evidence.

13. However, the primary concern advanced by Mr. Nasim was that upon considering the bank statements the Judge identified that on numerous occasions a debit card 'established' the appellant to be present in London.

'4. ... [The appellant's former wife] believes he lies about working overtime at weekends when he is in fact staying with friends in London. (There are transactions on the [building society] account of the appellant (not all are here detailed) which place him in London for a couple of days or more on an almost weekly basis at round certain dates, namely, thus, TfL and Shepherd's Bush on 0.4.10.22; TfL and Camden Town on 11.10.22; Just Eat London on 13.10.22; Odeon Cinemas London 16.10.22; TfL London and Gather Gather London 23/27.10.22; TfL, Salsa Charing Cross, AL Apex London, Maidstone, Wok to walk London, Just Eat London 28.12.21-03.01.22; Just Eat London and Klarna London 28.02.22-04.03.22; Just Eat London and Klarna London 12-17.03.22; Just Eat London and Croydon 21-24.03.22; Just Eat and Klarna London 01/03.04.22; Hoza Croydon and Just Eat London 05-07.04.22; Klarna and Just Eat London 14-16.04.22; and Mytennight Night and Klarna London 21-27.04.22).

14. The Judge concluded at [28]:

'28. That [the appellant's former wife] must nonetheless be deemed to be correct in her assessment that the appellant has prioritised his own private life, in relation to which [the appellant's child] only exists on the margins, and which is principally directed towards his presence within a social circle in London, as is evidenced from his bank statements, there being no direct evidence at all on his private life apart from his employment.'

15. Mr. Nasim observed that Klarna is Swedish fintech company that permits those using its services to spread out payments for online purchases over an agreed time. The company's United Kingdom headquarters is situated in Kingsway, London.

16. Just Eat is an online food order and delivery company operating throughout the United Kingdom, with its domestic headquarters in Fleet Place, London.

17. MyTenNights is a charity based at Shelton Street, London, which provides an automatic facility for online donations during the last ten days of Ramadhan.

18. As to Gather & Gather, Mr Nasim confirmed that it is a catering company based in Bloomsbury Way, London, that provides canteen facilities at the appellant's workplace.

19. I accept that on their face, the references to 'London' on the appellant's bank statements in relation to these four companies and charities do not, without more, establish that he was in London on these dates. Therefore, if the Judge considered that they established the accuracy of former wife's contention that the appellant was spending time with friends in London

rather than visiting their child, then procedural fairness required the Judge to seek the appellant's observations on as to this evidence.

20. Such error flowed into the conclusion reached by the Judge at [29] of his decision:

'29. The available evidence therefore leads me to conclude that not only does the parental connection between the appellant and his daughter fall outside the immigration rules requirement at Appendix FM of being an active role. It is also of such a peripheral nature, as to fall outside the scope of a genuine and subsisting parental relationship under section 117B(6).'

21. I am satisfied that the finding of fact at [28] of the decision is a very strong, and adverse, one and is clearly founded upon the adverse finding made as to the appellant's regular visits to London established by the erroneous consideration of the bank statements. I am therefore satisfied, that having placed such weight on the conclusion reached, in respect of the bank statements, the Judge acted in a procedurally unfair manner by not asking the appellant to address his concerns. Consequent to the finding of procedural unfairness, I am satisfied that the error of law was material, and the decision should properly be set aside in its entirety.

22. In the circumstances, I am not required to consider grounds 1, 3 and 4.

### **Remaking the Decision**

23. I observe the presumption that the remaking of a decision will take place in the Upper Tribunal. However, I have concluded that the decision of the First-tier Tribunal materially errs consequent to procedural unfairness. Such finding of unfairness can only properly result in the matter being remitted back to the First-tier Tribunal.

24. The appellant should file with the First-tier Tribunal, and re-serve upon the respondent, the documents filed with the rule 15(2A) notice.

### **Notice of Decision**

25. The decision of the First-tier Tribunal sent to the parties on 8 November 2022 is materially erroneous in law. It is set aside, with no findings of fact preserved.

26. The remaking of the decision will be undertaken by the First-tier Tribunal sitting in Birmingham.

*D O'Callaghan*  
**Judge of the Upper Tribunal**  
Immigration and Asylum Chamber

**15 May 2023**