



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

Case No: UI-2023-003949

First-tier Tribunal No: HU/53189/2023  
LH/01824/2023

**THE IMMIGRATION ACTS**

**Decision & Reasons Issued:  
On 11 January 2024**

**Before**

**UPPER TRIBUNAL JUDGE HANSON**

**Between**

**DENIS MHILLI  
(NO ANONYMITY ORDER MADE)**

Appellant

**and**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Morgan Pearse Solicitors whose attendance was excused in advance in light of the concession made by the Secretary of State in relation to the procedural unfairness pleaded at Ground 1 of the grounds seeking permission to appeal.

For the Respondent: Ms Young, a Senior Home Office Presenting Officer.

**Heard at Phoenix House (Bradford) on 5 January 2024**

**DECISION AND REASONS**

1. The appellant appeals with permission a decision of First-tier Tribunal Judge Cowx ('the Judge'), promulgated on 30 July 2023, in which the Judge dismissed the appellant's appeal against the decision of 28 February 2023 which refused the application for leave to remain in the United Kingdom under Appendix FM of the Immigration Rules.
2. The appellant is a citizen of Albania born on 10 September 1999 who claim to be the father of a child, ART, born on 19 July 2021 in the UK, who is a British national.
3. The appellant's application was refused under paragraph R-LTRPT of Appendix FM as the decision-maker was not satisfied the appellant had provided sufficient evidence to show he was taking and intended to continue to take an active role in the child's upbringing, as required by E-LTRPT.2.4.2(b) of Appendix FM. It was also found the appellant could not succeed under any other provision of the

Rules and had not established there were exceptional circumstances that would lead to a breach of Article 8 ECHR.

4. At [11] the Judge writes *"In terms of factual findings, the parties are agreed that what I have to determine is a genuine and subsisting parental relationship with a qualifying child. It was agreed that ART is a qualifying child"*.
5. Having considered the documentary and oral evidence the Judge sets out his findings of fact from [43] of the decision under challenge. In relation to the Immigration Rules the Judge writes:

#### The Rules

60. Referring to paragraph E-LTRPT.2.4 of Appendix FM, DM does not have sole parental responsibility for ART and ART does not normally live with him. DM does have direct access (in person) to ART, as agreed with AT, with whom ART normally lives. To succeed under the rules, DM must also provide evidence which satisfies the respondent that he is taking and intends to continue taking an active role in ART's upbringing.
  61. At its highest the evidence produced by DM and AT shows that DM has had some non-caring contact with ART, but I find that contact has been limited to seeing ART in his own home or outwith the home for short periods of time and always with AT present, because she took the photographs which records the contact.
  62. I find the number of contacts DM has had with ART has been limited in number, measured by the number of photographs produced, most of which were not taken during ART's first year. The majority of the photographs are recent.
  63. It was not DM's or AT's evidence that ART ever spends any time in DM's sole care. It seems the only occasions when DM was alone with ART were the three recent occasions when DM took ART to the doctor. Because there is no other similar evidence, I find it is more likely that AT permitted DM to take ART to the doctor and ensured this was recorded by the GP so that it could be used to support this appeal. I find it more likely than not that those doctor's visits and the contacts recorded in the photographs were staged in order to provide the false impression that DM plays an active role in ART's life.
  64. There is no evidence at all that DM is involved in any of the important or even day to day decisions regarding ART.
  65. I find DM has not, does not and does not intend to play an active role in ART's life. He therefore does not meet the rules.
  66. It was Miss Kogulathas's contention that if DM fails to meet rules, he can still succeed under Section 117B(6). As I indicated at paragraph 10 of this decision, I will consider that provision as part of the wider Article 8 assessment.
6. In relation to Article 8 ECHR the Judge finds:

#### Article 8

67. The respondent has not taken issue with ART's parentage. It is not specifically accepted, but it is also not disputed. Therefore, for the purpose of this appeal I work on the basis that DM is ART's biological father. Assuming there are ties of blood between DM and ART, this is not enough by itself to constitute family life between DM and ART. DM and AT have painted a picture of weekly non-caring contact (with the odd time recently when DM has stepped in to take ART to the doctor). I am not persuaded that picture is genuine and therefore I conclude there is no family life at all and DM's appeal on human rights grounds must fail. I note again at this point that it was the appellant's case that the Tribunal was not required to consider his human rights.
68. If I am wrong about the existence of family life, I must next consider whether such interference would have consequences of such gravity as potentially to engage the operation of Article 8. I remind myself of the prevailing view that the threshold here is not especially high. Therefore, I would find that Article 8 would be engaged by such interference.

69. The next stage of the Razgar analysis is to decide whether such interference is in accordance with the law and that question must be answered in the affirmative because the proposed interference would be in accordance with domestic immigration law.
70. Such lawful interference, in accordance with domestic law is, I find, necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others. These are fundamental reasons for effective immigration controls.
71. The final stage in the analysis is to decide if such interference is proportionate to the legitimate public end sought to be achieved. As I have already indicated, I have applied the statutory direction when determining the question of proportionality.
72. I begin by considering Section 117B(6). It is not in dispute that it would be unreasonable to expect ART to leave the UK. The question to be answered is whether DM has a genuine and subsisting parental relationship ART. As I have already indicated, I am not persuaded the contact between DM and ART is as frequent as claimed given the paucity of evidence.
73. Even if the primary motive behind the contact between DM and ART is to enable DM to remain in the UK, it could still amount to a genuine and subsisting parental relationship. Miss Kogulathas submitted that DM's relationship with his child is stronger than that of the appellant in the case of SR. Having read that judgment and the facts of SR's case, I disagree with Miss Kogulathas's contention. In SR, the appellant had fortnightly 3-hour contact sessions. Those sessions were unsupervised and independent evidence on this level of contact was provided by CAFCASS. DM does not have and has never had unsupervised contact with DM, save for the three recent occasions when he took ART to the doctor, which I find were most likely events contrived by both DM and AT.
74. I find that ART is entirely independent of DM for his practical and emotional needs, and I find there is no genuine and subsisting parental relationship.
75. I have had regard to the public interest in the maintenance of effective immigration controls. On this issue, I note that the appellant does not meet the requirements of the immigration rules, which does not go in his favour when assessing his argument that any interference by the respondent would be disproportionate.
76. When assessing the proportionality of removal and having dismissed the claim of a genuine and subsisting parental relationship I have attempted to weigh any other factors which might count in DM's favour, but I have found none and none were suggested by Miss Kogulathas. DM has a poor immigration history having entered the UK illegally in September 2021 and, on his own account he entered and left the UK illegally in 2020 and this is another factor which counts against him.
77. Having carried out the proportionality balancing exercise, I conclude that the proposed interference is proportionate to the legitimate public end sought to be achieved.
78. A decision by the respondent to remove DM will not, in my judgement, amount to a breach of Article 8 ECHR.
79. Having considered GEN 3.2, I also find there are no exceptional circumstances in DM's case.
80. For the above reasons I dismiss the appeal on Article 8 grounds.
81. In reaching my decision in this appeal I have approached it on the basis that DM is the biological father of ART. However, I have my doubts about that, but these of course are not material to my decision and my comments on this point are obiter dicta. The respondent chose to concentrate on the role played by DM in ART's life and did not challenge DM's paternity. The respondent noted that ART was born prior to DM's illegal entry into the UK on 5 September 2021. DM answered this point by asserting that he was in the UK illegally from May 2020 to December 2020, in which time he conceived ART. Neither DM nor AT produced any supporting evidence of DM's presence in the UK in 2020, but they were not asked to provide it which is somewhat surprising.

7. The appellant sought permission to appeal, which was initially refused by another judge of the First-tier Tribunal but renewed the Upper Tribunal. Seven grounds are relied upon in the pleadings dated 15 September 2023.
8. Permission to appeal was granted by Upper Tribunal Judge Lindsley on 1 November 2023, the operative part of the grant being in the following terms:
  2. This is a renewed application for permission to appeal against the decision of the First-tier Tribunal made in Newcastle dismissing the appeal on Article 8 ECHR grounds.
  3. The grounds of appeal contend, in short summary, as follows. Firstly, it was procedurally unfair and an error of fact by the First-tier Tribunal to have raised the issue of the appellant untruthfully stating that he could not proceed with his asylum claim and a claim based on being a parent without notice to the appellant as this was not part of the respondent's case prior to the hearing, and a letter from the respondent dated 1st February 2023 could have been put in evidence showing that it was in fact the position of the respondent that the appellant could not proceed with both applications. An application was made to adduce post-decision evidence in support of the appellant's position being truthful was made to the First-tier Tribunal the day after the hearing but was not refused until after the decision had been made, which was procedurally unfair. This issue led to a conclusion that the appellant was not overall a person who was a credible witness and so this was material to the conclusion on the central issue: whether he had a genuine and subsisting relationship with his son.
  4. Secondly, it is argued, that the respondent's case was that the appellant had not actively participated in his son's upbringing. There was no allegation that he had fabricated his relationship with his son or engineered evidence, as found by the First-tier Tribunal. It is argued that there was further procedural unfairness in failing to put this allegation of large scale deception to the appellant so that he could respond.
  5. Thirdly, it is argued, the First-tier Tribunal failed to consider material evidence and inadequately reasoned the decision. The First-tier Tribunal argued that the evidence of GP visits of the appellant with his son was engineered to support an untrue narrative when that evidence was that he took his son to the GP, the son was noted to be clingy to "Dad" and the appellant gave information about his son's sickness the night before. There were also photographs of the appellant feeding his son, carrying him and playing with him, which are all evidence of "direct parental care" as required by SR (subsisting parental relationship - s117B(6) Pakistan [2018] UKUT 334.
  6. Fourthly, it is argued, there were errors of fact: there was evidence (photographic and other) that the appellant looked after his son not in the presence of his son's mother; and there was no evidence that the original birth certificate was at home as it had been sent to the registrar.
  7. Fifthly, it is argued that the First-tier Tribunal erred in law in relation to the reasoning in relation to the photographs as there were not of a small number of occasions and did not fail to show him as a young baby as argued.
  8. Sixthly, it is argued, the First-tier Tribunal in failing to give weight to the consistency of the evidence of the appellant and his son's mother when it should have been a factor which went to the credibility of the evidence, as was the fact that the evidence was given on oath as required by the First-tier Tribunal Judge.
  9. Seventhly, the First-tier Tribunal Judge included in his decision comments that he doubted the appellant's paternity which should not have been included as there was no evidence in support of this contention and which were highly damaging and whilst said not to affect the decision would inevitably have affected the decision-making on credibility.
  10. The grounds are all arguable.
9. The barrister who represented the appellant before the Judge has provided a detailed witness statement dated 13 August 2023. Having considered that

statement the Senior Presenting Officer did not require Counsel's attendance for the purposes of cross-examination.

10. A Rule 24 response has been filed, dated 4 January 2024, the operative part of which is in the following terms:

1. The respondent to this appeal is the Secretary of State for the Home Department. Documents relating to this appeal should be sent to the Secretary of State for the Home Department, at the above address.
2. Upon review of the grounds of appeal, statement from the barrister who represented the Appellant at the FTT and the bundles before the FTT, the Secretary of State accepts a material error of law is made out on ground one. The additional evidence was uploaded to the CCD platform on 28 July 2023 which was before promulgation of the decision. The FTT decision was uploaded to CCD on 30 July 2023 and the Appellant's application to adduce further evidence was refused on 2 August 2023 for the reason it was too late. The Secretary of State accepts the application was made before promulgation and therefore should have been considered by the FTT and if the application was to be refused, adequate reasoning needed to be provided. To refuse the application on the basis it was late which is an incorrect statement, is procedurally unfair to the appellant. As ground one relates to a procedural unfairness issue, the Secretary of State is of the view that the decision should be set aside and remitted to the FTT to be heard afresh with no preserved findings.
3. The concession made is in relation to the issue of whether there is a material error of law and is not a concession in relation to the any of the issues in the appeal.
4. The Secretary of State is not with the appellant in relation to the other points raised in the grounds but feels it is not necessary (unless required by the Tribunal) to address those grounds in detail in light of the concession above. If the Tribunal disagrees, the Secretary of State is more than obliged to set his position in relation to the rest of the grounds either in writing or orally at the EOL hearing listed for 5 January 2024.

### Discussion and analysis

11. Ground 1 asserts procedural unfairness/error of fact, for the following reasons:

4. The Judge found that it was "wholly incredible" that the reason why the Appellant withdrew his asylum claim was because he was told by the Respondent via letter that he could not proceed with both his asylum claim and application for leave to remain as a parent (and that he therefore had to choose one) [Determination, §58]. He goes on to state that the Appellant had "made up this evidence on the spot" [§58], that this undermined "his overall credibility" and that he was "a person who was prepared to be untruthful as it served his purpose" [§59]. This was therefore clearly a material issue affecting credibility.
5. However, a letter from the Respondent to the Appellant dated 1 February 2023 shows that the Appellant was in fact, telling the truth. It states, "Please be advised that you cannot proceed with both applications. Please send a signed declaration indicating which application/claim you wish to proceed with."
6. The issue of why the Appellant had withdrawn his asylum claim had never been raised prior to the hearing and so, the letter of 1 February 2023 was not included in the Appellant's Bundle. As the Home Office Presenting Officer, perhaps mistakenly but nevertheless wrongly cast doubt on the Appellant's explanation and the existence of the letter during the hearing (please see Counsel's witness statement, §10 and §14), the Appellant's representatives made an application to admit the letter as post-decision evidence.
7. The letter was submitted to the Tribunal on 28 July 2023 (a day after the hearing) and an application was made to admit it as post-decision evidence on the following basis:

"During the hearing, the Appellant was asked why he did not pursue an asylum claim to which he said that the Home Office wrote to him, stating that he could not

proceed with both his asylum claim and application for leave to remain as a parent. That was disputed by the Representative for the Home Office during the hearing.

We make an application to admit post-hearing evidence namely the Home Office's letter to the Appellant on 1 February 2023 stating that he could not proceed with both his asylum claim and his leave to remain application.

We rely on the case of *E & R v SSHD* [2004] QB 1044 [2004] EWCA Civ 49, in which the Court of Appeal confirmed that 'the tribunal remained seized of the appeal, and therefore was able to take account of new evidence, up until the time when the decision was formally notified to the parties' (para 92). We further submit that it would be in the interests of justice and fairness to admit this letter given that its existence was disputed at the hearing by the Home Office despite them having sent it to the Appellant."

8. The Judge did not consider the letter before making his decision 2 days later on 30 July 2023. FTTJ Thapar's statement in her refusal of permission that the admission of post-hearing evidence was "a matter for the Judge" is therefore misplaced given that the Judge did not even consider admitting it prior to making his decision. The application for admitting the late evidence was refused on the following basis on 2 August 2023 (following the decision):

"The Judge has advised the decision has been made so it is too late to adduce further evidence and it was too late once the hearing was finished."

9. It is incorrect that it was "too late" to adduce further evidence once the hearing finished. As held in *E & R v SSHD* [2004] QB 1044 [2004] EWCA Civ 49 'the tribunal [...] [is] able to take account of new evidence, up until the time when the decision was formally notified to the parties.' [§92].
  10. The fact that the application to admit the post-hearing evidence was not considered in time is procedurally unfair. Furthermore, the letter itself demonstrates that there was a clear error of fact that the Respondent's representative wrongly advanced.
  11. The letter would have corrected a material factual error and its absence was relied on by the Judge to find the Appellant's credibility to be significantly damaged [§58-59]. As the letter clearly shows that the Appellant was telling the truth, the Judge's finding otherwise cannot stand.
  12. Contrary to FTTJ Thapar's contention, the error of fact and the failure to consider post-decision evidence are material errors of law. The Judge not only made credibility findings against the Appellant on an incorrect factual basis but did so in such strong and unambiguous terms in two whole paragraphs [§58- 59], stating that the Appellant's "overall credibility" was damaged and that this rendered him "a person who was prepared to be untruthful as it served his purpose" [§59].
  13. The Appellant's credibility was material to the central question of whether he had a genuine and subsisting parental relationship with his son. The Judge's findings on this issue are therefore vitiated by error.
12. Mr Young conceded the procedural error is material as it is clear the Judge specifically states at [58] that he found the appellant "to be wholly incredible" in relation to his asylum claim, that he was not telling the truth on that point, and being satisfied that the appellant was making up his evidence on the spot. The Judge was not satisfied the Secretary of State would have written to the appellant in the terms claimed and was clearly not aware of the policy of only one claim being permitted to be in existence at any time.
  13. The Judge specifically finds that if the appellant did submit an asylum claim and then withdrew it that was of his own choice. The correspondence the appellant sought to admit post-hearing, but before determination, sought to address this specific point and established that the Judge's assessment of the chronology and the basis for withdrawing the appellant's claim was wrong.

14. A determination speaks from the date of promulgation and the Judge's finding that the application to admit the additional evidence was "too late" is also wrong. The application was clearly made before promulgation and should have been considered as conceded by the Secretary of State.
15. At [59] the Judge finds no plausible reason why the appellant would withdraw his paid asylum claim if it was genuinely in fear of persecution, but the new material and the appellant's own evidence shows the reason he did so was as he claimed. The Judge rejecting the appellant's claim he was forced to withdraw his asylum claim has been shown to be an incorrect finding. As a result of the Judge's error and misunderstanding of the position the Judge finds: "*I conclude that his asylum claim was not genuine, and he decided to pursue the family member route as he believed it offered a greater chance of success. This undermines DM's overall credibility; and that I find he is a person who is prepared to be untruthful if it serves his purpose.*"
16. I find the reasons set out in Ground 1, the concession in the Secretary of States Rule 24 reply, and the material available as a whole, the Judge has committed a procedural irregularity sufficient to amount to a material error of law. The Judge did not necessarily have to admit the post-hearing evidence, wxbut the Judge should have considered the same and, if deciding not to admit it, have given adequate reasons for so doing.
17. I find, when reading the determination as a whole that the Judge's assessment of the credibility of the appellant generally has been infected by the view formed in relation to the reliability of the appellant's witness of truth, and specific finding that he was willing to say anything to assist his case.
18. I set the decision aside. In relation to the future management of this appeal the Court of Appeal have made it clear that where procedural unfairness is established affecting a determination in a material manner, it does not matter whether there are other findings that it may be possible to preserve. Such a decision needs to be reheard de novo. In the current appeal the Judge's findings in relation to the credibility of the appellant infects the assessment as a whole. For that reason I find there are no preserved findings.
19. Having considered the Presidential Guidance, the decision of the Upper Tribunal in Begum, in relation to the issue of remittal, and the extent of the fact finding that is required to be made on the next occasion, which is likely to relate to all issues at large in the appeal, I consider it appropriate that the appeal be remitted to the First-tier Tribunal sitting at Newcastle to be heard afresh by a judge other than Judge Cowx.

### **Notice of Decision**

20. The First-tier Tribunal has been shown to have materially erred in law. The decision of the Judge is set aside with no preserved findings.
21. The appeal shall be remitted to the First-tier Tribunal sitting at Newcastle to be heard afresh by a judge other than Judge Cowx *de novo*.

### **C J Hanson**

Judge of the Upper Tribunal  
Immigration and Asylum Chamber

**5 January 2024**