



**Upper Tribunal  
(Immigration and Asylum Chamber)**

Appeal Number: HU/11169/2016

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 8 February 2018**

**Decision & Reasons Promulgated  
On 28 February 2018**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE FROMM**

**Between**

**ABDELMAJID [T]**  
(NO ANONYMITY DIRECTION MADE)

Appellant

**and**

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

Respondent

**Representation:**

For the Appellant: Ms K Reid, Counsel

For the Respondent: Mr I Jarvis, Senior Home Office Presenting Officer

**DECISION AND REASONS**

**The appeal**

1. The appellant is a citizen of Algeria born on [ ] 1974. He claims to have entered the UK illegally, using a false identity, in March 1998. For five years between 2010 and 2015 he held a residence card acknowledging his right of residence as the extended family member (partner) of an Irish national. He has two children from that relationship. However, he has not seen his children since an incident in June 2014 which led to the

permanent breakdown of his relationship with his partner. On 20 January 2017 the Worcester Family Court made a Child Arrangements Order whereby the appellant was to have indirect contact with his children on a monthly basis.

2. On 22 January 2016 the appellant applied for leave to remain in the UK on the grounds of his private life (10-year route). His application was refused on 15 April 2016 because he did not meet any of the requirements of paragraph 276ADE(1) of the Immigration Rules and there were no exceptional circumstances to warrant a grant of leave outside the rules. The indirect contact he enjoyed with his children could continue if the appellant were in Algeria.
3. The appellant appealed and his appeal was heard by the First-tier Tribunal on 5 October 2017 at Taylor House, London. The judge was told that, two days earlier, the appellant had applied to the Central Family Court for a new contact order. He was not legally represented but he had been advised by the campaign group, Fathers for Justice.
4. The judge dismissed the appeal. He found the appellant did not satisfy the rules. With respect to the children, he noted the appellant's residence in the UK had been unlawful for the majority of the time and found at paragraph [17] that:

"It follows, therefore, that much of the relationship the Appellant has formed with his children occurred at a time when he was unlawfully in the UK and, in accordance with the provisions of section 117B, I am required to give little weight to that relationship. The prospects of a different contact order are, for the purpose of this appeal, merely speculation. The Appellant is capable of exercising the current contact order from Algeria."
5. The grounds seeking permission to appeal relied on *MH (pending family proceedings - discretionary leave) Morocco* [2010] UKUT 439 (IAC) and *MS (Ivory Coast)* [2007] EWCA Civ 133 to the effect that a decision to remove an applicant in the process of seeking a contact order may violate article 8 if it would deny the applicant the possibility of meaningful involvement in the proceedings. The grounds asserted, as had the grounds of appeal to the First-tier Tribunal that a Cafcass report had concluded that the appellant's presence in his children's lives was crucial. Ms Reid could not show me that any such wording had ever been used.
6. Permission to appeal was granted by the First-tier Tribunal. The respondent filed a rule 24 response opposing the appeal because the judge appeared to find the application for a contact order had been made two days before the hearing. In order for the appellant to qualify for leave, the contact order application would have to have been made for genuine reasons and not to frustrate the removal process.
7. Mr Jarvis helpfully confirmed he would not be relying on the line of

argument set out in the rule 24 response. The judge had not taken the point that the appellant had made the application in order to frustrate removal.

### **The submissions**

8. Ms Reid argued the judge had failed to ask himself the questions set out in paragraph 43 of *RS (immigration and family court proceedings) India* [2012] UKUT 00218 (IAC). He had been told that the appellant was not satisfied with the outcome of the hearing in January 2017 and had taken advice leading to his further application. Whilst the judge was right to have directed himself not to speculate about the outcome of the new contact proceedings, he had failed to ask himself whether the proceedings were likely to be material to the immigration decision. Ms Reid submitted it was clear they would. The issue was whether the appellant's removal would effectively deprive him of the opportunity of participating effectively in the proceedings.
9. In reply, Mr Jarvis focused on the duty of the judge to consider the factors set out in paragraph 43(iv) of *RS (India)*. Unlike the factual position in the authorities, the judge in this case already knew what the Family Court's assessment was of the children's best interests. His approach was therefore correct.
10. Ms Reid pointed out that there were materials before the judge which led up to the January decision on contact but there was no reasoned judgment of the court.
11. I raised with the representatives the question of whether the court's decision should be read as finally determining the issue or whether, as it appeared to me, it was likely to be the case that what was in the best interests of the children would evolve over time. There was agreement that there was a difference if, for example, an appellant had made a series of unsuccessful applications in rapid succession. Such applications would be likely to fall into the category of those made purely to frustrate removal.
12. I reserved my decision as to whether the decision of the First-tier Tribunal should be set aside for material error of law in accordance with section 12(2) of the Tribunals, Courts and Enforcement Act 2007. The representatives were in agreement that, if I found an error of law, I could remake the decision myself.

### **Decision on error of law**

13. In *RS (India)*, the panel provided the following guidance:

“43. In our judgment, when a judge sitting in an immigration appeal has to consider whether a person with a criminal record or adverse immigration history should be removed or deported when there are family proceedings contemplated the judge should consider the

following questions:

- i) Is the outcome of the contemplated family proceedings likely to be material to the immigration decision?
- ii) Are there compelling public interest reasons to exclude the claimant from the United Kingdom irrespective of the outcome of the family proceedings or the best interests of the child?
- iii) In the case of contact proceedings initiated by an appellant in an immigration appeal, is there any reason to believe that the family proceedings have been instituted to delay or frustrate removal and not to promote the child's welfare?
- iv) In assessing the above questions, the judge will normally want to consider: the degree of the claimant's previous interest in and contact with the child, the timing of contact proceedings and the commitment with which they have been progressed, when a decision is likely to be reached, what materials (if any) are already available or can be made available to identify pointers to where the child's welfare lies?"

14. This guidance is clearly flexible enough to apply in non-deportation cases because the weight to be given to the public interest under (ii) can be adjusted. The guidance was subsequently approved by the Court of Appeal in *Mohan v SSHD* [2012] EWCA Civ 1363. The Court traced the origin of the point to *Ciliz v The Netherlands* (29192/95, 11 July 2000) in which the ECtHR said a decision to expel a person in such circumstances prejudged the outcome of the access proceedings by denying the applicant all possibility of meaningful further involvement in the proceedings. This failed to afford the applicant sufficient protection for his article 8 interests. *Ciliz* informed the domestic decision in *MS (Ivory Coast)*. The Court in *Mohan*, noting the decision in *Nimako-Boateng (residence orders - Anton considered)* [2012] UKUT 00216 (IAC), explained that the Family Court is best placed to evaluate the best interests of children. Both the decision itself and the reasons for the outcome are material to the consideration of the article 8 proportionality balancing exercise.
15. In this case, it is clear the judge was shown various documents, such as a Cafcass assessment and an application for contact, as recently submitted by the appellant. Ms Reid was unable to confirm that the Worcester Family Court had consented to the disclosure of documents relating to the contact proceedings. That is no criticism of her or those now instructing her. The firm of solicitors which had previously represented the appellant before the First-tier Tribunal has, it seems, been closed down. It is not known what steps they took. In any further proceedings, such materials must not be disclosed unless consent has been obtained.
16. Having carefully considered the submissions made by the

representatives, I have concluded the judge's decision does contain a material error and should be set aside. The authorities show that there is a wide spectrum of cases in which, at the one end, removing the applicant would deprive him of the possibility of making his case for contact and also make it almost impossible for him to obtain the benefit of any successful application. At the other end, there are cases in which absentee fathers, having shown next to little or no interest in their children, make an application or serial applications with very little prospect of success. In such case there is no breach of article 8.

17. Judges hearing such appeals should follow the approach set out in paragraph 43 of *RS (India)* in order to establish where on the spectrum the case lies. I agree with Ms Reid that the judge did not do so and did not even begin to answer the first question. By noting that the outcome of the application was a matter of speculation, the judge was right but he also appears to have held back from assessing the impact the outcome of the application could have on the proportionality question.
18. Mr Jarvis's submission regarding the fact this was the appellant's second application for contact and, furthermore, one which was made within a year of the previous order, does not mean the judge was not obliged to consider the impact nonetheless. I do not read the authorities as ruling out the applicability of the *RS (India)* guidelines in second or multiple application scenarios. The judge could only rationally conclude there was no or negligible impact if, having had the benefit of reading a full set of documents and, perhaps, a reasoned judgment of the Family Court, it was clear the prospect of the appellant succeeding in upgrading his contact with his children to direct supervised contact was negligible. The judge had some documents and appears to have taken a view that the appellant was undeserving of contact. In any event, his final approach was to disregard the application as being a matter of speculation.
19. It is right to point out, as Mr Jarvis did, that the Family Court decided that the children's best interests did not require direct contact with the appellant to be allowed. As said, the Family Court is best placed to make that assessment. However, I do not think that means the tribunal can ignore the fact a further application has been made. There is evidence that the appellant was dissatisfied with the order and immediately took steps to obtain advice about what to do next. This is not a case of a man who has not had any role in his children's lives. Evidently, his relationship with his ex-partner became "toxic" but the appellant lived with his children until 2014. He has expressed concern that his ex-partner might take them to Ireland without informing him. There was material before the judge showing the appellant had a genuine interest in his children and his application was not purely a means of frustrating removal.
20. The appellant's appeal is allowed and the decision of the First-tier Tribunal is set aside.

## **Remaking the decision**

21. I remake the decision by allowing the appeal. I accept the appellant is committed to seeking to obtain direct contact with his children. He is actively pursuing this through the proper channels and, if a favourable order were made, it is likely he would participate in contact in order to make a success of it. This is the only reason he has for remaining in the UK but I do not consider he is using the contact proceedings purely to frustrate removal. He has a genuine interest in the outcome.
22. It is clear the outcome of the current Family Court proceedings might have a significant impact on family life in this case as between the appellant and his children. If the court decides, having looked at the current position, that the children's best interests would require them to have direct contact with the appellant, that would be a significant matter of weight in the proportionality balancing exercise. By the time the case has been resolved, sufficient time will have elapsed since the previous order to consider there might be a different outcome. The children will be older and therefore more mature. The respondent's argument that the contact can be maintained while the appellant is abroad would fall away. The appellant has a poor immigration history but not one which would inevitably outweigh the best interests of children.
23. As matters stand, removing the appellant to Algeria would deny him the possibility of pursuing contact proceedings which may not be in his children's best interests. That would be a disproportionate interference with family life and in breach of article 8.
24. In terms of how to give effect to this decision, the tribunal no longer has power to direct the respondent to grant a period of discretionary leave in order to enable the appellant to participate effectively in the proceedings. I must therefore leave this to the respondent to determine. A grant of one year's discretionary leave would enable him to work and fund his legal representation so that he has a fair opportunity to make his case to the court. This is preferable to adjourning the appeal pending the outcome of the Family Court proceedings.

## **NOTICE OF DECISION**

The Judge of the First-tier Tribunal made a material error of law and his decision dismissing the appeal is set aside.

The following decision is substituted:

The appeal is allowed on human rights grounds.

An anonymity direction has not been made.

**Signed  
2018**

**Dated 9 February**

**Deputy Judge of the Upper Tribunal  
Froom**