



**Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/18030/2019**

THE IMMIGRATION ACTS

**Birmingham Civil Justice Centre
On 26th October 2021**

**Decision & Reasons Promulgated
On the 16th November 2021**

Before

UPPER TRIBUNAL JUDGE MANDALIA

Between

MR FIRAS MAHDI SALEH

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr J Howard, Fountain Solicitors

For the Respondent: Mr C Bates, Senior Home Office Presenting Officer

DECISION AND REASONS

- 1.** The appellant's appeal against the respondent's decision of 25TH October 2019 to refuse his application for leave to remain in the UK on the basis of his family and private life and on Article 8 grounds, was dismissed by First-tier Tribunal Judge Robertson for reasons set out in a decision promulgated on 9th April 2020.

- 2.** Permission to appeal was granted by Upper Tribunal Judge Rintoul on 30th July 2020. Following a hearing before Upper Tribunal Judge Sheridan on 8th February 2021, the decision of the First-tier Tribunal was set aside for reasons set out in an error of law decision promulgated on 18th February 2021. At the hearing, the Presenting Officer accepted Judge Robertson fell into a material error when considering whether the appellant has a genuine and subsisting parental relationship with his son. Upper Tribunal Judge Sheridan found the decision of the First-tier Tribunal Judge was infected by a material error of law and directed that the appropriate course is for the decision to be remade in the Upper Tribunal. In doing so he noted at paragraph [7] of his decision, that none of the credibility findings made by the First-tier Tribunal Judge had been challenged by the appellant or were undermined by the error of law. The credibility findings were preserved. At paragraphs [9] and [10] of his decision, Upper Tribunal Judge Sheridan said:

“9. The central issue in the remaking of the appeal will be the relationship between the appellant and his children. Clearly, the evidence of the appellant’s children (and his wife) is highly relevant to this. I informed Mr Khan that, unless there is a good reason, an adverse inference may be drawn if the appellant’s wife and children do not submit witness statements and do not make themselves available for cross-examination.

10. I also informed Mr Khan that I would expect the appellant provide evidence relating to, and explain in a witness statement the circumstances of, the points raised in paragraph 14(v) of the decision (about his remand in custody, prohibition on entering Birmingham and the condition he cannot contact his wife or daughter).”

- 3.** The appeal was listed for a resumed hearing before Upper Tribunal Judge Sheridan on 23rd April 2021. That hearing was conducted as a remote hearing by Skype. The appellant’s wife did not attend the hearing, but his son had attended the offices of the appellant’s solicitors and was available for cross-examination. The parties both sought an adjournment, albeit for different reasons. Upper Tribunal Judge Sheridan agreed with the parties that the hearing should be adjourned and there should be a face-to-face hearing as suggested by the Presenting Officer. The appellant was directed to file and serve an agreed consolidated

bundle of documents that the parties can rely upon at the adjourned hearing.

4. The appeal was listed for a resumed hearing before me on 5th October 2021 to remake the decision. In readiness for the hearing of the appeal, the appellant's representatives have filed and served a consolidated bundle comprising of some 368 pages. I was also provided with some additional material, to be inserted as pages 369 to 374 of the bundle and a skeleton argument prepared by the appellant's solicitors dated 19th October 2021.
5. At the conclusion of the hearing before me, I informed the appellant that I allow his appeal on Article 8 grounds. I said that I would set out my reasons for doing so in writing and this I now do.

INTRODUCTION

6. The appellant is an Iraqi national. He last arrived in the United Kingdom as a visitor on 22nd April 2018 with leave to enter valid until 28th September 2018. After his leave to enter had expired, on 24th October 2018, the appellant applied for leave to remain on family and private life grounds. The appellant relied upon his relationship with his two children. The appellant's daughter, who I refer to as [A] was born on 1st January 2002 and is now 19 years old. The appellant's son, who I refer to as [Y] was born on 14th January 2005 and is now 16 years old. By a decision dated 25th October 2019, the respondent refused a human rights claim made by the appellant.
7. In her decision of 25th October 2019, the respondent confirmed the application does not fall for refusal on grounds of suitability. The respondent was not however satisfied that the appellant meets the eligibility relationship requirements set out in paragraphs E-LTRPT.2.2 to 2.4 of Appendix FM of the Immigration Rules. In addition, the respondent concluded the appellant does not meet the eligibility immigration status

requirement. The respondent concluded the appellant does not qualify for leave to remain under the 10-year parent route of Appendix FM, or the 10-year private life route set out in Part 7 of the Immigration Rules. The respondent went on to consider whether there are exceptional circumstances which would render refusal a breach of Article 8 because it would result in unjustifiably harsh consequences for the appellant, a relevant child or another family member. The respondent concluded in the end that the decision to refuse the application is proportionate to the legitimate aim of maintaining effective immigration control.

8. The appellant has appealed that decision under s82 of the Nationality, Immigration and Asylum Act 2002 on the ground that the decision is unlawful under s6 of the Human Rights Act 1998.
9. In her decision promulgated on 9 April 2020, Judge Robertson found the appellant's evidence to be inconsistent and lacking in credibility. Although the decision of Judge Robertson was set aside by Upper Tribunal Judge Sheridan, he noted at paragraph [7] of his decision, that none of the credibility findings made by the First-tier Tribunal Judge had been challenged by the appellant or were undermined by the error of law. The credibility findings were preserved. It is useful for me to begin by setting out the credibility findings made by First-tier Tribunal Judge Robertson:

"14. I state at the outset that I found the appellant's evidence to be inconsistent and lacking in credibility. In doing so I have particular regard to the following:

- i) In his witness statement the Appellant states that he had visited the UK on several occasions to see his family. On the last occasion *'While I was on my visit visa my personal circumstances have changed. My wife and children demanded my stay and they persuaded me to apply for a visa to stay with them.'* (WS Para 5). It is the subsequent application which is the subject of this appeal. However, this is not borne out by his evidence that he sold his apartment and car in the UAE and resigned from an apparently well-paid job before he left for the UK he also bought property in the UK to rent out for an income.
- ii) It is clear that the Appellant had no intention of returning on the expiry of his visit visa despite a declaration in the visit visa application that he would do so. In abusing the immigration

procedure in this way, he has shown a contempt for the Immigration Rules and a propensity to be untruthful.

- iii) In respect of the relationship with his family I have evidence of photographs taken when the children were very young and those taken more recently. Whilst I accept that there has been some degree of contact between the Appellant and his children, I do not accept that this alone translates to an involvement in the lives of the children on a day-to-day basis.
- iv) The Appellant stated that his children depend on him financially and bank statements have been submitted in support. However, the statements are only from December 2018 when the Appellant was in the UK, after he had submitted his application. They show some occasional direct payments to both children and highlighted goods, all of which appear to be gifts. There are no regular payments evidencing a contribution to their upkeep. Similarly, I have evidence of the appellant paying for a holiday to Turkey, but no reference to a contribution to essential outgoings, despite the Appellant stating at the hearing that he supported the family financially as their benefits were not enough. Given that the Appellant has been separated from his children for at least three years I consider it reasonable to expect evidence of regular ongoing payment towards their financial upkeep over that time, which would not have been difficult to obtain.
- v) In respect of the Appellant's contact with his children I accept that since he has been in the UK, he has seen them though I question the regularity and frequency of the contact. The Appellant came to the UK in April 2018. His passport suggests that he had visited three times in 2017 and had returned on each occasion. His evidence as to the regularity of contact is not consistent. In his witness statement he states that '*I see my children on a daily basis*' (WS para 9). At the hearing he stated that he saw them at least once a week. It is unclear how either was practicable as until recently the Appellant lived in London. At some point after his arrival he was remanded in custody for unknown offences. I have not been provided with any details other than a document granting conditional bail from 13th September 2018. The conditions included a curfew to the Appellant's London address, a prohibition on him entering Birmingham other than to attend the Crown Court and a condition not to contact directly or indirectly the Appellant's wife or his daughter. No explanation has been offered by the appellant nor was he asked about it at the hearing. In the absence of further details I am unable to draw any adverse conclusions as to the Appellant's relationship with his wife and daughter save to note that he would have been prevented from having any contact with them, and indirectly with his son, for an unspecified period of time."

The issues

- 10.** The appellant and his former wife separated in August 2018. There are two children of that relationship. The appellant's daughter, [A] was 16 when the appellant arrived in the UK in April 2018, and she is now 19 years old. His son [Y], was 13 when the appellant came to the UK, and he is now 16 years old.
- 11.** The burden of proof in respect of all matters, is upon the appellant and the standard of proof is the balance of probabilities.
- 12.** The appellant attended the hearing and was accompanied by five witnesses, including his former wife, Yasmine Alaaney and his son [Y]. At the outset of the hearing before me, Mr Bates confirmed that the central issue in the appeal is whether the appellant has a genuine and subsisting parental relationship with his son, who is a British citizen. Mr Bates confirmed that he accepts it would not be reasonable to expect the child to leave the United Kingdom, in light of the particular family dynamics, including the relationship between [Y] and his mother and sister. Mr Bates invited me to hear the evidence of the appellant's former wife and his son and said he would then reflect on that evidence and consider whether the respondent maintains the appellant does not have a genuine and subsisting relationship with his son.
- 13.** Mr Howard acknowledged the appellant had been charged with the offence of controlling or coercive behaviour in an intimate or family relationship but was acquitted of the charge in June 2019. He acknowledges that the bail conditions the appellant was subject to, prevented the appellant from going near his former wife's property and from seeing his children. Although the appellant had been acquitted, the parties agreed that in order to ensure the appellant's former wife and his son, were able to give their evidence openly, the appellant should wait outside the hearing room, whilst their evidence was heard. I explained to the appellant, the course proposed by the representatives, and he was happy to proceed in that way.

The evidence

- 14.** As I have already set out, in readiness for the hearing before me, the appellant's representatives have provided the Tribunal with a consolidated hearing bundle that now comprises of some 374 pages. It is entirely impractical for me to refer in this decision to all the evidence that is set out in the extensive bundle prepared by the appellant's representatives.
- 15.** I heard oral evidence from the appellant's former partner, Yasmine Alaaney and from his son [Y]. The oral evidence received is set out in the record of proceedings and is a matter of record. There is nothing to be gained by a full recital of that evidence in this decision.
- 16.** Ms Yasmine Alaaney gave evidence with the assistance of an Arabic interpreter. She adopted her witness statement dated 6th September 2021. She confirmed that the appellant has a genuine and strong bond with their son, [Y]. She confirmed [Y] spends most of his time away from school with his father and his father takes care of most of his needs regarding his education. She said that as well as being a role model, the appellant encourages [Y] with support and seeks to guide him with good morals. She said that she is entirely happy and comfortable for [Y] to spend time with his father. She said [Y] usually sees his father every weekend and although there is no fixed pattern, he spends a large part of his holidays with the appellant. In cross-examination she confirmed that she is happy to give evidence and had not been placed under any pressure to do so. She confirmed [Y] had last seen his father over the previous weekend, and that when he sees his father he will normally stay overnight. She said that [Y] had gone to his father on Saturday and returned home yesterday, because it is now the half term holiday. She confirmed the appellant pays maintenance in that he pays for anything associated with [Y's] education. She confirmed [Y] is aware that his father pays for his school activities. She was unable to give the

appellant's address but confirmed she knows where it is, and that the appellant lives in a flat above some shops. She confirmed that she had never visited the appellant's home herself, but it is a short drive away from her own home and is in an area where she regularly attends to do her shopping. She said that most of the time, [Y] is picked up and dropped off by his father for contact, but if she happens to be in the area, she occasionally picks [Y] up after contact.

- 17.** [Y] gave his evidence in English. He adopted his witness statement dated 8th April 2021 and confirmed that although he continues to live with his mother, he sees his father every weekend, and during holidays, he is mainly at his father's house. [Y] gave an account of his relationship with the appellant, and an account of the role played by the appellant in his life, that was consistent with the evidence of Ms Yasmine Alaaney.

Submissions

- 18.** After hearing the oral evidence of Ms Yasmine Alaaney and [Y], Mr Bates confirmed on behalf of the respondent, that he is satisfied that the appellant has established he has a genuine and subsisting parental relationship with [Y], who is a British citizen and therefore a qualifying child. He confirmed the respondent accepts it would not be reasonable to expect [Y] to leave the UK because of the particular family dynamics.

Findings and conclusions

- 19.** It is uncontroversial that the appellant is the father of [A] and [Y]. The appellant confirms in his witness statement that [A] no longer lives with her mother and she very rarely has any contact with him. He confirms that she is over 18 and is independent. Mr Bates, quite probably my judgement, accepts the appellant has a genuine and subsisting parental relationship with [Y]. The appellant has established a family life with [Y] and article 8 is plainly engaged. I find that the decision to refuse the appellant leave to remain may have consequences of such gravity as

potentially to engage the operation of Article 8. I accept that the interference is in accordance with the law, and that the interference is necessary to protect the legitimate aim of immigration control and the economic well-being of the country. The issue in this appeal, as is often the case, is whether the interference is proportionate to the legitimate public end sought to be achieved.

- 20.** In reaching my decision I have had regard to the best interests of [Y] as a primary consideration. The appellant clearly has a close relationship with [Y] and having had the opportunity of hearing from [Y], I am quite satisfied that [Y] benefits from the support provided to him by the appellant. It is in [Y's] best interests for the appellant to remain in the UK. I note however that [Y] continues to live primarily with his mother who has overall responsibility for his day-to-day care. The leading authority on section 55 remains ZH (Tanzania) v Secretary of State for the Home Department [2011] UKSC 4. In her judgment, Lady Hale confirmed that the best interests of a child are "a primary consideration", which, she emphasised, was not the same as "the primary consideration", still less "the paramount consideration".
- 21.** In reaching my decision, I have also had regard to the public interest considerations set out in s117B of the Nationality, Immigration and Asylum Act 2002. The maintenance of immigration control is in the public interest. I remind myself that s117B(4) of the 2002 Act provides that little weight should be given to a private life established by a person at a time when the person is in the United Kingdom unlawfully. The appellant has undoubtedly established a private life in the UK but that has been established at a time when he has been in the United Kingdom unlawfully. However, and more importantly, s117B(6) of the 2002 Act provides that in the case of a person who is not liable to deportation, the public interest does not require the person's removal where the person has a genuine and subsisting parental relationship with a qualifying child, and it would not be reasonable to expect the child to leave the United

Kingdom. Here, the respondent now accepts the appellant has a genuine and subsisting parental relationship with [Y] who is a qualifying child and that it would not be reasonable to expect [Y] to leave the United Kingdom.

- 22.** In my final analysis, I am satisfied that on the facts here, the decision to refuse leave to remain is disproportionate to the legitimate aim of immigration control. In the circumstances I allow the appeal on Article 8 grounds.

Notice of Decision

- 23.** I allow the appeal on Article 8 grounds.

- 24.** I decline to make a fee award. I have reached my decision based upon evidence before me that was not before the respondent when she reached her decision to refuse the application.

Signed **V. Mandalia**

Date

26th October 2021

Upper Tribunal Judge Mandalia