



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

Appeal Number: HU/15920/2019_P

THE IMMIGRATION ACTS

Decided under Rule 34 without a hearing
On 9 September 2020

Decision & Reasons Promulgated
On 14 September 2020

Before:

UPPER TRIBUNAL JUDGE GILL

Between

Mr Eduard Domi
(ANONYMITY ORDER NOT MADE)

Appellant

And

The Secretary of State for the Home Department

Respondent

This is a decision on the papers without a hearing. The appellant requested an oral hearing by remote means. No submissions were received from the respondent on this issue. The documents described at paras 4 and 7 below were submitted. A face-to-face hearing or a remote hearing was not held for the reasons given at paras 9-26 below. The order made is set out at para 53 below. (*Administrative Instruction No. 2 from the Senior President of Tribunals*).

Representation (by written submissions):

For the appellant: Mr J Dhanji, of Counsel, instructed by Malik & Malik Solicitors.
For the respondent: (No submissions received)

DECISION AND DIRECTIONS

1. The appellant, a national of Albania born on 16 July 1982, appeals against a decision of Judge of the First-tier Tribunal N Lodge (hereafter the "Judge") who, in a decision promulgated on 10 January 2020 following a hearing on 30 December 2019, dismissed his appeal on human rights grounds (Article 8) against a decision of the respondent of 5 September 2019 to refuse his application of 6 December 2018 for leave to remain on human rights grounds.
2. Permission to appeal was granted by the First-tier Tribunal ("FtT") in a decision signed on 7 April 2020 and sent to the parties by email on an unknown date.
3. On 23 June 2020, the Upper Tribunal sent to the parties a "*Note and Directions*" issued by Upper Tribunal Judge Lindsley dated 22 June 2020. Para 1 of the "*Note and Directions*" stated that, in light of the need to take precautions against the spread of Covid-19, Judge Lindsley had reached the provisional view, having reviewed the file in this case, that it would be appropriate to determine questions (a) and (b) set out at para 1 of her "*Note & Directions*", reproduced at my para 8(i)(a) and (b) below, without a hearing. Judge Lindsley gave the following directions:
 - (i) Para 2 of the "*Note and Directions*" issued directions which provided for the party who had sought permission to make submissions in support of the assertion of an error of law and on the question whether the decision of the FtT should be set aside if error of law is found, no later than 14 days after the "*Note and Directions*" was sent to the parties; for any other party to file and serve submissions in response, no later than 21 days after the "*Note and Directions*" was sent; and, if such submissions in response were made, for the party who sought permission to file a reply no later than 28 days after the "*Note and Directions*" was sent.
 - (ii) Para 3 of the "*Note and Directions*" stated that any party who considered that despite the foregoing directions a hearing was necessary to consider questions (a) and (b) may submit reasons for that view no later than 21 days after the "*Note and Directions*" is sent to the parties.
4. In response to the directions in the "*Note and Directions*", the Upper Tribunal has received the following documents submitted on the appellant's behalf under cover of an email 7 July 2020 timed at 21:21:
 - (i) a document entitled: "*Appellant's Written Submissions* " dated 7 July 2020 by Mr Dhanji; and
 - (ii) a copy of a Child Arrangements Order ("CAO") dated 17 February 2020 made by the Family Court at Luton in respect of the appellant's children, a boy hereafter referred to as "E", born on 8 June 2016, and a girl hereafter referred to as "M", born on 28 July 2017.
5. No evidence has been submitted to show that the consent of the Family Court was obtained in order to submit the document to the Upper Tribunal in the instant appeal.
6. In any event, as the CAO post-dates the decision of the Judge, it cannot be relied upon in order to establish that the Judge materially erred in law.
7. No submissions have been received on the respondent's behalf in response to the directions in the "*Note and Directions*", whether in relation to questions (a) and (b) or

in relation to whether the Upper Tribunal should proceed to decide questions (a) and (b) without a hearing.

The issues

8. I have to decide the following issues (hereafter the "*Issues*"),
- (i) whether it is appropriate to decide the following questions without a hearing:
 - (a) whether the decision of the Judge involved the making of an error on a point of law; and
 - (b) if yes, whether the Judge's decision should be set aside.
 - (ii) If yes, whether the decision on the appellant's appeal against the respondent's decision should be re-made in the Upper Tribunal or whether the appeal should be remitted to the FtT.

Whether it is appropriate to proceed without a hearing

9. As I said at para 7 above, no submissions have been received on the respondent's behalf in response to the directions in the "*Note and Directions*", whether in relation to questions (a) and (b) or in relation to whether the Upper Tribunal should proceed to decide questions (a) and (b) without a hearing.
10. I do not rely upon the mere fact that the respondent has not made any submissions as a factor that justifies proceeding without a hearing.
11. At para 19 of his submissions, Mr Dhanji stated that the appellant requests a hearing conducted remotely. At paras 20-24, he refers to dicta at para 8 of R (Siddiqui) v Lord Chancellor and others [2019] EWCA Civ 1040 to the effect that it is an "*undeniable fact that the oral hearing procedure lies at the heart of English civil procedure*"; dicta of the late Laws LJ at para 38 of Sengupta and another v. Holmes and others [2002] EWCA Civ 1104 to the effect, inter alia, that "*oral argument is perhaps the most powerful force there is, in our legal process, to promote a change of mind by a judge*"; and dicta of Keene LJ at para 47 of Sengupta v Holmes concerning the impact that oral submissions may have on the decision-making process.
12. Mr Dhanji submitted that an oral hearing allows an advocate to focus the arguments and affords the opportunity to "*reflexively engage*" with the judge and with the arguments presented by each other in real time and to assist the Tribunal on issues that may arise during the hearing. He submitted that oral argument is the best means available to effectively communicate with a Tribunal.
13. Mr Dhanji then submitted that the instant case "*would undoubtedly benefit from these features of oral argument*", which suggests (in his submission) that an oral hearing should take place, unless there are sufficient countervailing reasons against it. He submitted that there is little reason against using technology to provide for a remote hearing.
14. I have carefully considered Mr Dhanji's submissions.

15. I take into account the force of the points made in the dicta of Laws LJ and Keene LJ at paras 38 and 47, respectively, of Sengupta v Holmes; the judgments of Lord Bingham and of Lord Slynn in Smith v Parole Board [2005] UKHL 1; the dicta at para 17(3) of Wasif v SSHD [2016] EWCA Civ 82 concerning the power of oral argument; dicta in the decision in R v Sussex Justices, ex parte McCarthy [1924] 1 KB 256 to the effect that justice must be done *and* be seen to be done; and the dicta at para 8 of R (Siddiqui).
16. I am aware of and take into account the Supreme Court's judgment in Osborn and others v Parole Board [2013] UKSC 61. I have applied the guidance at para 2 of the Supreme Court's judgment.
17. The appeal in the instant case is straightforward. Given that my decision is limited to the Issues, there is no question of my making findings of fact or hearing oral evidence or considering any evidence at this stage.
18. In addition, I take into account the seriousness of the issues in the instant appeal for the appellant. The appellant's Article 8 claim before the Judge included his reliance upon his relationship with his two minor children, E and M. They were aged 3 years 6 months and 2 years 5 months as at the date of the Judge's decision. Accordingly, the outcome of the appellant's appeal to the Upper Tribunal will have an impact on them, whether or not he succeeds in establishing that the Judge's decision should be set aside. The instant case therefore relates to an important matter.
19. I have considered all the circumstances very carefully and taken everything into account, including the overriding objective.
20. In relation to Mr Dhanji's submissions concerning the appellant having the opportunity at an oral hearing to "*reflexively engage*" with the respondent's submissions/arguments, the fact is that the respondent has not advanced any submissions. There is therefore no question of the appellant being denied the opportunity to "*reflexively engage*" with the respondent's submissions/arguments.
21. Taking a preliminary view at this stage of deciding whether it is appropriate and just to decide the Issues without a hearing, I considered the Judge's decision, the grounds and the submissions before me. I was of the view, taken provisionally at this stage, that there was nothing complicated at all in the assessment of the Issues in the instant case, given that the grounds are simple and straightforward and the Judge's decision straightforward. I kept the matter under review throughout my deliberations. However, at the conclusion of my deliberations, I was affirmed in the view I had taken on a preliminary basis. No issues arose during the course of my deliberations that I would have asked the parties to address if there had been a hearing, whether a face-to-face hearing or a remote hearing. Thus, the appellant has not been denied the opportunity of "*reflexively engaging*" with the Tribunal.
22. Mr Dhanji's submission that "*the instant case would undoubtedly benefit from these features of oral argument*" was not otherwise explained.
23. Whilst I acknowledge that the Tribunal is now listing some cases for face-to-face hearings and using technology to hold hearings remotely in other cases where it is

appropriate to do so, the fact is that it is not possible to accommodate all cases in one of these ways without undue delay to all cases.

24. Of course, it is impermissible, in my view, to proceed to decide a case without a hearing if that course of action would be unfair in the particular case. If it would be unfair to proceed to decide an appeal without a hearing, it would be unfair to do so whatever the delay in convening a hearing or the consequent delay on other cases being heard. The need to be fair cannot be sacrificed.
25. There are cases that can fairly be decided without a hearing notwithstanding that the outcome of the decision may not be in favour of the party who is the appellant. In the present unprecedented circumstances brought about by the coronavirus pandemic, it is my duty to identify those cases that can fairly be decided without a hearing.
26. Having considered the matter with anxious scrutiny, taken into account the overriding objective and the guidance in the relevant cases, including those I have mentioned above, I concluded that it is appropriate, fair and just for me to exercise my discretion and proceed to decide the Issues without a hearing, for the reasons given in this decision.

Questions (a) and (b) - whether the Judge erred in law and whether his decision should be set aside

27. The appellant's Article 8 claim was based, in part, on private life established in the United Kingdom since his claimed illegal entry in September 2004 and, in part, on family life with his two children (E and M). E and M are nationals of Albania.
28. I shall refer to the mother of the appellant's children hereafter as "EM". EM is also a national of Albania. At paras 1-3 of her witness statement dated 30 December 2019 (AB/11), she says that she claimed asylum after her arrival in the United Kingdom but that she was granted leave to remain on the basis of human rights because she had come to the United Kingdom as a minor. It therefore appears that she was first granted leave to remain in the United Kingdom as an unaccompanied minor. According to her residence permit (AB/102), she has leave to remain in the United Kingdom until 8 April 2021 and is permitted to undertake work. She does not explain the outcome of her asylum claim. There was therefore nothing before the Judge to suggest that EM had been found to have a well-founded fear of persecution in Albania.
29. The appellant and EM began their relationship in 2015. They split up in 2018. In oral evidence before the Judge, EM said that she would not return to Albania under any circumstances.

The Judge's decision

30. It was accepted on the appellant's behalf that he could not meet the requirements of Appendix FM of the Immigration Rules and also that he could not satisfy the requirements of para 276ADE(1)(vi) of the Immigration Rules. Before the Judge, the appellant relied upon Article 8 outside the Immigration Rules.

31. The Judge summarised the appellant's evidence about the role he plays in the lives of his children at para 16 of his decision. At para 17, he said that he accepted that the appellant played a parental role in the lives of his children and he accepted that it was in the best interests of the children that he should continue to play a role in their lives. He then considered the best interests of the children and concluded, at para 24, that the decision was proportionate.

32. Paras 13-24 of the Judge's decision read:

"13. The appellant claims to have entered the UK in September 2004. He has been here illegally since that time and has never had leave to remain.

14. It is accepted he cannot meet the Rules. He cannot meet Appendix FM because his ex-partner and the mother of his children is not British, nor does she have indefinite leave to remain. His two children are in the same position. Mr Dhanji further conceded that the appellant cannot meet Paragraph 276 ADE (1) (vi).

15. The appellant relies on Article 8 outside the Rules. He asserts that the decision is disproportionate having regard to his parental relationship with his two children.

16. The appellant and his ex-partner split up in 2018. Since that time, the appellant has had contact with his children who are now aged 2 years and 3 years of age. On the evidence, he looks after them overnight when his ex-partner is working nights. In evidence before me, she said that there could be as many as six nights a week. He also takes the children to nursery school and picks them up occasionally from nursery school. He sees them at weekends as well.

17. I accept that the appellant is playing a parental role in the lives of his children. I accept that it is, as it always is, in the best interests of the children that he should continue to play a role in their lives.

18. If the situation was that the appellant and his former partner were in a subsisting relationship, there would be little difficulty in resolving this issue. The children are young and their focus of interest must inevitably be on their parents. Neither of the children have established any significant private life. Neither parent has indefinite leave to remain and accordingly they could return as a family unit to Albania.

19. In this case however, the appellant and his ex-partner are not in a subsisting relationship. His ex-partner has limited leave to remain and indicates that she will not return under any circumstances to Albania.

20. The ultimate question, as EV (Philippines) puts it is, is it reasonable to expect the child(ren) to follow the parent with no right to remain to the country of origin? In this case, neither parent is British and neither has indefinite leave to remain. If the appellant is removed, the mother will remain until her limited leave expires in 2021? I appreciate of course that it may be further renewed.

21. It is important to note that the appellant's ex-partner is not on the path to settlement, *pace*; GM (Sri Lanka) v SSHD 2019.

22. I am satisfied that this must be a matter of choice for the appellant's ex-partner. Does she put the interests of the children having contact with their father before her desire (no doubt for a better economic and educational life) for herself and her children? If she puts the best interests of her children having contact with their father first, she will follow him with the children back to Albania. If she does not, she will remain in the UK should he be removed.

23. More generally, the appellant has never had leave to remain. Any private life he has established has been established whilst his immigration status is illegal. He does not speak English. He is not financially independent. He does not meet the Immigration Rules.

24. Looking at the matter in the round, and bearing in mind that the best interests of the children cannot in any event be a trump card, I am satisfied that the decision to remove the appellant is, having regard to the maintenance for immigration control, proportionate."

The grounds

33. There are two grounds as follows:

(i) Ground 1 is that the Judge erred by failing to consider whether it is in the best interests of E and M to remain in the United Kingdom.

(ii) Ground 2 is that the Judge erred by failing to approach his assessment of E's and M's best interests and the proportionality of the respondent's decision on the basis of the "*real world in which the children find themselves*".

Submissions

34. In relation to ground 1, Mr Dhanji drew attention to the fact that the Judge accepted the appellant's evidence, summarised at para 16, about the role he plays in the lives of E and M and found at para 17 that it is in E's and M's best interests that the appellant continues to play a role in their lives.

35. However, in Mr Dhanji's submission, the Judge then failed to consider the material question of whether it is in E's and M's best interests to remain in the United Kingdom. In this regard, Mr Dhanji relied upon para 58 of the judgment of the Court of Appeal in EV (Philippines) v SSHD [204] EWCA Civ 874 where the Court of Appeal said:

"58 ... If one parent has no right to remain, but the other parent does, that is the background against which the assessment is conducted..."

36. The circumstances of the instant case were that the appellant and EM were no longer in a relationship. EM has leave to remain in the United Kingdom in her own right. EM gave evidence, with which the Judge did not take issue, that she would not return to Albania under any circumstances. Pursuant to para 58 of EV (Philippines), it was incumbent upon the Judge to consider whether to was in the best interests of E and M for the appellant to remain in the United Kingdom with them.

37. Mr Dhanji acknowledged that the best interests of E and M were not a trump card even if their best interests lay in their remaining in the United Kingdom. However, he submitted that their best interests would need to be afforded "*significant weight*". It was therefore critical, in his submission, that their best interests were properly identified before the Judge embarked upon an assessment of how a fair balance should be struck between the public and individuals' interests applicable in the instant case.

38. In relation to ground 2, Mr Dhanji relied upon KO (Nigeria) v SSHD [2018] UKSC 53 at para 19, EV (Philippines) at para 58 and SA (Bangladesh) at para 22, to the effect that it is necessary to determine the proportionality of the respondent's decision by reference to the "*real world in which the children find themselves*".
39. In this regard, Mr Dhanji drew attention to para 20 of the Judge's decision where he posed the following question, described by Mr Dhanji as the determinative question:
- "is it reasonable to expect the child(ren) to follow the parent with no right to remain in the country of origin?"
- and that the Judge answered this question at para 22 by concluding that it is a matter of choice for the appellant's ex-partner.
40. In Mr Dhanji's submission, the Judge erred by failing to approach his assessment of E's and M's best interests and the proportionality of the respondent's decision on the basis of the "*real world in which the children find themselves*".
41. In the instant case, the "*real world*" in which E and M find themselves is that their father, the appellant, has no leave to remain whereas they and their mother do have leave to remain; their parents are no longer in a relationship; and their mother gave evidence, which the Judge did not take issue with, that she would not leave the United Kingdom with the children to follow the appellant to Albania.
42. Accordingly, in Mr Dhanji's submission, the "*real world*" consequence of the respondent's decision is that E and M would be separated from their father who the Judge found currently plays an active role in their upbringing. In his submission, the Judge's task was to determine, on these real world facts, whether this consequence was proportionate to the legitimate aim being pursued by the respondent but he failed to do so.
43. Mr Dhanji submitted that it was insufficient for the Judge to answer the question that he posed at para 20 of his decision by stating that it was a matter of choice for the appellant's ex-partner.

Assessment

44. It is clear from the Judge's decision that he took into account the fact that the appellant and EM were no longer in a relationship, that EM had said in evidence that she would not return to Albania under any circumstances (para 19 of the Judge's decision), that EM had leave to remain until 2021, that there was a possibility of her leave being renewed (para 20) but also that she was not on a path to settlement. The Judge was therefore plainly aware that, if the appellant is removed, the children would be separated from the appellant unless EM chose, notwithstanding her evidence in court, to return to Albania so that the children could continue to have contact with the appellant. Indeed, it is plain, from para 22 as a whole and in particular the final sentence of para 22, that he had in mind that, if EM chose to remain in the United Kingdom, the children would be separated from the appellant.
45. The Judge said at para 17 that it is in the best interests of the children that the appellant should continue to play a role in their lives. I accept that the Judge did not state, in terms, that it is in the best interests of the children for the appellant to

continue to play a role in their lives *in the United Kingdom*. However, the decision must be read as a whole. When the finding of the Judge at para 17, that it is in the best interests of the children that the appellant should continue to play a role in their lives, is read together with para 22 where the Judge referred to EM and the children having a better economic and educational life in the United Kingdom, it is plain, in my judgment, that he did *implicitly* find that the best interests of the children were for the appellant to continue playing a role in their lives *in the United Kingdom*.

46. I therefore do not accept that the Judge erred by failing to consider whether it was in the best interests of the appellant's children for them to remain in the United Kingdom and for the appellant to continue to play a role in their lives.
47. Ground 1 is therefore not established.
48. Contrary to ground 2 and for the reasons given at para 44 above, the Judge did consider proportionality by reference to the *"real world in which the children find themselves"*. This much is abundantly clear from everything I have said at para 44 above.
49. It is not the case that the Judge answered the question he posed at para 20 simply by stating that it was a matter of choice for EM. Notwithstanding her evidence that she would not return to Albania under any circumstances, the Judge was right to consider that she nevertheless had a choice.
50. The choice that EM faces was plainly *part of* the Judge's overall assessment of proportionality, given that it is clear that his reasons for dismissing the appeal were set out not only at para 22 but in paras 12-24 and that it is clear from para 24 that he reached his conclusion on proportionality by *"looking at the matter in the round"*.
51. I therefore reject ground 2.
52. For all of the reasons given above, I am satisfied that the Judge did not err in law. The appeal is therefore dismissed.

Notice of Decision

53. The decision of the First-tier Tribunal did not involve the making of any error on a point of law. The appellant's appeal to the Upper Tribunal is therefore dismissed.

Upper Tribunal Judge Gill

Date: 9 September 2020

NOTIFICATION OF APPEAL RIGHTS

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be **received** by the Upper Tribunal within the **appropriate period** after this decision was **sent** to the person making the application. The appropriate period varies, as

follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent:

2. Where the person who appealed to the First-tier Tribunal is **in the United Kingdom** at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is **12 working days (10 working days, if the notice of decision is sent electronically)**.
3. Where the person making the application is in detention under the Immigration Acts, **the appropriate period is 7 working days (5 working days, if the notice of decision is sent electronically)**.
4. Where the person who appealed to the First-tier Tribunal is **outside the United Kingdom** at the time that the application for permission to appeal is made, the appropriate period is **38 days (10 working days, if the notice of decision is sent electronically)**.
5. A “working day” means any day except a Saturday or a Sunday, Christmas Day, Good Friday or a bank holiday.
6. The date when the decision is “sent’ is that appearing on the covering letter or covering email