



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal number HU/15016/2019

THE IMMIGRATION ACTS

Heard at Field House
by Skype for Business
On 14 May 2021

Decision & Reasons Promulgated
On 27 May 2021

Before

UPPER TRIBUNAL JUDGE GLEESON

Between

I R (ALBANIA)
(ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the appellant: Mr Abdul Kader Yusuf, an Immigration Executive with
Kingswood Solicitors

For the respondent: Ms Susana Cunha, a Senior Home Office Presenting Officer

Anonymity order

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) The Tribunal has ORDERED that no one shall publish or reveal the name or address of I R who is the subject of these proceedings or publish or reveal any information which would be likely to lead to the identification of him, his children, his former partners or of any member of his family in connection with these proceedings.

Any failure to comply with this direction could give rise to contempt of court proceedings.

DECISION AND REASONS

Decision and reasons

1. The appellant appeals with permission against the decision of the First-tier Tribunal dismissing his appeal against the respondent's decision on 22 August 2019 to refuse him leave to remain on Article 8 ECHR private and family life grounds. The appellant is a citizen of Albania.
2. **Error of law decision.** Following a hearing on 2 February 2021, I set aside the decision of the First-tier Judge for perversity and directed that the decision in this appeal be remade in the Upper Tribunal on a date to be fixed.
3. **Mode of hearing.** The hearing today took place remotely by Microsoft Teams. There were no technical difficulties. I am satisfied that all parties were in a quiet and private place and that the hearing was completed fairly, with the cooperation of both representatives.
4. **Evidence and submissions.** Following triage directions given in the light of the Covid-19 pandemic, both parties provided written and oral submissions. I heard oral submissions from both representatives and reserved my decision, which I now give. I have had regard to all the evidence which was before the First-tier Judge, whether or not referred to expressly in this decision, as well as the evidence and written submissions prepared for this appeal hearing. I have given the two new witness statements such probative weight as they will bear, as no oral evidence was given by either the appellant or his former partner.
5. **New matter.** The appellant and his former partner have two children, a son born in 2016 and a daughter born in December 2019. The elder child's paternity was confirmed by a DNA test. The respondent accepts the paternity of the younger child. Although the existence of that child is a 'new matter', Ms Cunha did not object to the Upper Tribunal engaging with it in these proceedings. The elder child is not a qualifying child, since he is only 5 years old. The younger daughter is 2 years old now.

Background

6. The appellant entered the United Kingdom unlawfully on 1 February 2013, aged 27. He is now 35 years old. The appellant has had two relationships since coming to the United Kingdom. He has not married either of his partners. Since coming to the United Kingdom, the appellant has not worked, although both his current and former partners have done so. His former partner works as a cleaner and his current partner is a bank nursing assistant.
7. On 22 May 2017, he made a private and family life application based on his relationship with his former partner, an Israeli citizen with refugee status, and their son born in 2016. The application was refused. He was appeal rights exhausted on

that application on 30 April 2019, around the time the relationship with his former partner broke down.

8. The appellant's former partner had refugee status based on domestic violence by her former husband, and a fear of him and of retribution from her family members in Israel, who also abused her when she lived there. As a recognised refugee, the appellant's ex-partner is understandably unwilling to travel to or live in any other country, having found herself safe in the United Kingdom, and is not willing for her child to go to meet his father in Albania or a third country.
9. The appellant's former partner ejected him from their home in April 2019 when she discovered that his current partner was pregnant, and that the child was probably the appellant's. The appellant's former partner was 8 weeks pregnant then with their daughter. The appellant became street homeless for a time, and his former partner was hospitalised with depression and suicidal ideation. The appellant looked after their son while she was in hospital.
10. The appellant and his former partner parted on bad terms, by reason of the appellant's infidelity with his current partner, but after mediation in July 2019, she agreed to a contact arrangement, on the basis that the appellant would not take her child outside the United Kingdom. She did so reluctantly, but in the best interests of her small son, to whom she accepted that the appellant had always been a good father. A letter dated 31 July 2019 from Dr A Ali at St Helier's Medical Practice confirmed that the appellant was still registered at that practice and that he accompanied his son to medical appointments there.
11. On 30 June 2019, the appellant made the present application, based on his private and family life with his current partner, a British citizen. The appellant's current partner's father helped to broker the settlement which led to the contact arrangement. The father built a relationship with the appellant's former partner, on the assumption that his daughter's child would be a sibling to the appellant's children with her. In the event, that child, born in March 2020, has been established by DNA evidence not to be this appellant's child. His current partner and her father provided no evidence for the Upper Tribunal remaking hearing and took no part in the hearing.

First-tier Tribunal decision

12. First-tier Judge Ford correctly took the decision of First-tier Judge O'Hagan in December 2018 as her *Devaseelan* starting point. She relied on the finding by Judge O'Hagan that the appellant would not face significant obstacles in re-integration in Albania, and held that the appellant's private and family life did not outweigh the public interest in controlling immigration. She found the appellant's former partner to be a frank and honest witness and accepted that there was family life between the appellant and his son.
13. The First-tier Judge found that the appellant's former partner would not bring their child to Albania to see him. She noted 'the difficulties within their relationship *and the possible impact on [the appellant's ex-partner and the child's] status if she was to leave the*

*United Kingdom*¹. They would not be returning to Albania as a family, as Judge O'Hagan had found they would, because in the meantime the relationship between the adults had irretrievably broken down. The appellant's ex-partner no longer qualified as his partner within the Immigration Rules.

14. The appellant's current partner did not attend the First-tier Tribunal hearing; her father did, and gave evidence on her behalf that he had not particularly wanted her to have a child by the appellant but that now she had, he would support the couple, wherever they lived, and 'pay for everything'. The appellant's current partner had difficulty conceiving with her previous partner and the baby, expected to be that of the appellant, was 'a miracle'.
15. The appellant's evidence to the First-tier Tribunal was that his current partner was very supportive of him, 'more than anyone else' and that when they discussed where he should live, he said he did not know what to do, but told her that 'it was in her hands to decide'.

Evidence before the Upper Tribunal

16. There was new evidence before me from the appellant and his former partner, as well as medical and independent social worker evidence, which was not before the First-tier Tribunal. There was no further evidence from the appellant's current partner or her father: although the relationship is said to continue, there may have been a shift because the child she is raising is not the appellant's child.
17. The appellant made an updated witness statement on 1 May 2021. He said that he was still in a relationship with his British citizen partner, but that they had 'recently discovered that I am not the father of her child'. He had discovered that his former partner was pregnant following their separation and that she gave birth to his daughter on 30 December 2019. The appellant said he was continuing to comply with the July 2019 contact agreement plan and that his former partner had allowed him to see his daughter at the same time as his son, without the need for a further contact agreement. He was grateful that she continued to allow him parental involvement in this way. The appellant felt it necessary to remain in the United Kingdom 'so that I can continue to be a part of [both children's] life and play the role of the father which our children will require throughout their life to ensure their proper and normal development'. The appellant was not called to give evidence and his witness statement was not tested in cross-examination.
18. On 21 August 2020, the appellant's ex-partner made a witness statement, confirming that under no circumstances would she take the child to a third country (in context, Turkey), nor allow him to travel there to visit the appellant:

"... 4. I do not wish to be difficult, but I have already fled my home country as a refugee and do not trust any other country to protect my safety, and that of my son, as

¹ *Emphasis added*

the United Kingdom who have been tremendously generous to make me feel safe with my son.

5. I have since had a video call with a family solicitor, who have advise me that I am the resident parent and am allowed to take out a prohibited steps order if I feel unsafe about my son travelling and I wish to state to the court that I am more than willing to go down this road if need be. ... "

19. The appellant's ex-partner made another statement on 5 February 2021. She said that she genuinely believed that there would be a severe psychological impact on her son if the appellant were removed. The appellant and her son had a very special bond, closer than the boy's bond with her. During the period after she ejected the appellant from the family home, and separated the boy from his father, he threw constant tantrums and struggled to sleep at night. Following mediation, she decided to allow contact and saw the improvement in the child's behaviour when he was seeing his father again.
20. The appellant's ex-partner had no other family members in the United Kingdom, because she came here as a refugee. There was no one, apart from the appellant, to help her look after her son and she was 'truly grateful to know that [the boy] has a father who loves him unconditionally'. The appellant's former partner said she had a history of depression and felt that her son's father was the only person who could care for him in her absence. She had always worked long hours, trying to put food on her family's table, and keep her small family financially secure, and she needed the appellant to care for the child while she worked.
21. The appellant's ex-partner was not called to give evidence and so her statements are untested by cross-examination.

Medical evidence

22. An updating letter from St Heliers Medical Practice in Birmingham on 24 February 2021 from Dr T Collum is brief and largely hearsay. He stated that the appellant's ex-partner had given oral consent for a letter to support the immigration case of the appellant. He said that the former partner had depression, anxiety and obsessive compulsive disorder. She was receiving oral anti-depressants, under the care of the Birmingham and Solihull Perinatal Mental Health Team. That was the only fact in Dr Collum's letter of which he had direct knowledge.
23. Dr Collum repeated the assertion by the appellant's ex-partner that the appellant was a great emotional support to her in continuing recovery and stability of her mental issues and that she feared that in his absence her mental health might deteriorate. The appellant offered child care, enabling her to work and support her family 'as is required financially'. When the appellant had no access to their children 'during medication' she perceived that as having a significant effect on the older boy's mental health: the child had anger and behavioural difficulties, according to his mother.
24. A letter dated 18 December 2020 from the Birmingham and Solihull Mental Health NHS Foundation Trust (Perinatal Mental Health Services in Edgbaston) to the

appellant's solicitors confirmed that they were monitoring the appellant's ex-partner's mental health. The diagnosis was one of recurrent depressive disorder, and her current episode was described as 'moderate'. The writer considered that if the appellant's ex-partner was not granted 'settled citizenship' for which she had applied on 28 January 2021, she might not be able to keep herself safe and might make plans to harm herself.

25. The appellant's ex-partner had experienced physical and emotional abuse in Israel from her own mother, and sexual abuse from a maternal uncle and from her cousins, between the ages of 8 and 12 years old. She had come to the United Kingdom in 2014 with her then husband who was a student in Exeter. She was then 21 years old. The marriage was an abusive one, with frequent sexual abuse: she had been forced to marry her much older husband when she was only 16, and the marriage had lasted 3½ years.
26. In the United Kingdom, the appellant's ex-partner had claimed asylum and the Home Office provided accommodation. Her abusive husband found and assaulted the appellant's ex-partner; he was deported to Israel for that. The appellant's ex-partner was in constant fear of being found and harmed by her family. She had provided newspaper reports of honour killings close to her home town in Israel.
27. The appellant's ex-partner had been known to the Birmingham and Solihull Mental Health Team since January 2019, having first contacted them for issues around forced marriages and honour killings. By April 2019, she was 'under Crisis Team' and her clinical notes referred to her being a refugee from Israel, with a history of 'physical abuse and other' and a long history of depression and post-traumatic stress disorder, including suicidal ideation and low mood.
28. In May 2019, she was referred to the Perinatal Mental Health Team: she was then 8 weeks pregnant. She now had two children for whom she provided care: her well being was paramount so that she could look after her children and have security to remain in the United Kingdom. She was still under the regular care of the South Perinatal Mental Health Team 'due to frequent depressive episodes'. There is no mention of the appellant's involvement with the children or his support for the appellant's ex-partner.

Independent social worker report

29. Ms Nasreen Rashid provided an independent social worker report dated 15 February 2021. She had met the family on 9 February 2021 at their family home in Birmingham. She had interviewed the appellant's ex-partner, but not the appellant or his current partner.
30. During her visit, the appellant was in another room with the two children and Ms Rashid observed him with his children from a distance. She thought he was patient: both children were hanging on him and pulling his hair, and clearly enjoying playing with the appellant. He did not get agitated, which Ms Rashid was glad to see. From these 'short observations and experience' Ms Rashid considered it 'abundantly clear

that both these children share a very close bond with [the appellant] who loves them dearly'. That appears to have been the extent of Ms Rashid's interaction with the appellant or the children.

31. Ms Rashid then set out the ex-partner's account of her circumstances, of her difficult childhood, and of her gratitude for the appellant's support. At [28] she noted that the appellant's ex-partner had a diagnosis of recurrent depressive disorder and post-traumatic stress disorder, and had been admitted to hospital for treatment following suicidal ideation and low mood. The appellant had stepped in to provide their son with his basic care needs (the daughter was not yet born, it seems), allowing the appellant's ex-partner to focus on her recovery. The appellant, according to the appellant's ex-partner, was 'so in tune with [the boy's] needs that the impact of any change is likely to not only disrupt his stability but also has the potential to destabilise [the appellant's ex-partner's] mental health'.
32. The appellant's ex-partner was reluctant to form positive relationships for fear of being located by her birth family and punished for the shame she had brought upon them by leaving her husband and not returning to Israel, where she had been abused by her family as well as her husband. The appellant's ex-partner felt she could not access support in the United Kingdom and being without the appellant would be the last straw. There is no mention in the report of the support being provided by Birmingham and Solihull Mental Health Services, to which the former partner was referred 18 months earlier.
33. Ms Rashid considered that if the appellant were not there to support the appellant's ex-partner, the children were likely to be taken into care. He was described by the appellant's ex-partner as a 'hands on father', who took the older child to school and after school activities, made home cooked healthy meals, and had daily walks with the family dog. Ms Rashid considered that the boy would be at risk of severe psychological and behavioural difficulties if he experienced not having his father as part of his life.
34. Ms Rashid considered that, on the basis of the situation as reported to her, and having regard to Article 8 ECHR

"45. ...it would seem to be a reasonable decision to make in [the appellant's] best interests and those of his son that he remains in the United Kingdom'.

46. The permanent relocation of [the appellant] is likely to impact on the stability that currently exists for [the child] as well as on ability to form a loving relationship with their primary care giver [the appellant's ex-partner]. [The appellant] should therefore have the right to remain with his family with whom he has formed emotional connections."

35. There is no mention of the appellant's relationship with his new partner and her child. She was not interviewed and it is unclear whether Ms Rashid was aware of her existence as part of this complex and shifting family situation.

Other evidence

36. Copies of the appellant's ex-partner's and the children's residence permits show that they were granted indefinite leave to remain on 14 April 2021, the appellant's ex-partner for 'refugee settlement' and the children simply for 'settlement'. The daughter's short form birth certificate confirms her date of birth but not her parentage.
37. There is a letter from Mrs Gilbert-Silver, the Early Years Manager at Priory School in Edgbaston, saying that the appellant's son, who was now attending school, spoke positively of his father and memories of family activities, including building and woodwork which they did together. If the father 'were to be separated' Mrs Gilbert-Silver considered that it was have a significant impact on the child's current positive relationship with his father and the child's wellbeing. It is not clear whether Mrs Gilbert-Silver knew that the separation had already taken place, in April 2019, or whether she was aware that the appellant had a new partner now. There is no mention of the appellant collecting or dropping the child off for school, attending parents' evenings, or other direct school involvement.

Appellant's submissions

38. In his written submissions, Mr Yusuf appeared to accept that the appellant could not bring himself within the Rules. He asked the Upper Tribunal to apply a structured approach to proportionality, balancing the need for immigration control against the effect on the appellant, his former partner, and their son and now baby daughter. The appellant relied on the emotional dependency between the appellant and his children; the close bond developed between father and son during the appellant's residence in the United Kingdom;
39. At the hearing, Mr Yusuf described the appellant's former partner as 'stuck in the United Kingdom'. He reminded me of the contents of the independent social worker's report, which was recent. Ms Rashid had met the family to make that report. In 2019, following their separation, the appellant's ex-partner had been hospitalised under the Mental Health Act. Mr Yusuf could not point to evidence of which section of the Act had been applied to her.
40. The only support the appellant's ex-partner had was the appellant: they were cordial with each other in the best interests of their children. There was a genuinely strong father-son relationship between the appellant and his older boy, who would probably have to go into local authority care if the appellant were removed. The crisis team had been involved and the appellant's ex-partner was on a high dose of anti-depressant medication. If the children were taken into care, that would place a further burden on the United Kingdom's post-pandemic financial position which was unnecessary in the circumstances.
41. Mr Yusuf relied on *Zoumbas*, *Razgar* and on *KO (Nigeria)* and argued that leave to remain should have been granted on Article 8 grounds. The appellant's breach of immigration laws was only indirectly relevant to the best interests of the children.

42. The appellant would rely on the observation of Lady Hale JSC (with whom Lord Neuberger PSC, Lord Kerr JSC and Lord Sumption JSC agreed) in *P (by his litigation friend the Official Solicitor) v Cheshire West and Chester Council & Anor* [2014] UKSC 19 (19 March 2014) that deprivation of physical liberty, guaranteed by Article 5 ECHR, was the same for everyone, whether or not they have physical or mental disabilities: 'A gilded cage is still a cage'. It is not entirely clear to me what the relevance of Article 5 is to this appeal.

Respondent's case

43. For the respondent, Ms Cunha relied on her skeleton argument. Permission to appeal had been granted on the limited basis of consideration of the elder child's best interests if the appellant were removed. The appellant had not sought to challenge any other element of the decision.

44. In oral argument, Ms Cunha said that there was no evidence before the Upper Tribunal to support a finding that the appellant's ex-partner had been sectioned under the MHA and Mr Yusuf was not in a position to give evidence on that. The evidence was that the appellant's ex-partner had anxiety, depression, obsessive-compulsive disorder and post-traumatic stress disorder. The appellant's ex-partner had thrown the appellant out of their home when she discovered his affair and that his British citizen partner was pregnant.

45. During her time in hospital in 2019, the appellant had been more involved with the children. There was no material in the bundle to indicate whether the appellant's ex-partner had approached social services for help, or about what support she received. There was no indication that there had been any interference with her parental responsibility. The appellant was not back in his ex-partner's life: his evidence was that he is still with his new British citizen partner, although as it turned out, the child she had was not his child.

46. The best interests of the appellant's children were to remain with their mother, his former partner. They all now had indefinite leave to remain in the United Kingdom and were on the route to British citizen status. There was not insufficient evidence to show that removing the appellant would be a disproportionate breach of the children's best interests. Ms Cunha asked me to dismiss the appeal.

Analysis

47. The appellant has been in the United Kingdom without leave since February 2013. Any private life, or family life with a qualifying partner, developed during that period, can be given little weight: see section 117B(4) of the Nationality, Immigration and Asylum Act 2002 (as amended). Neither of his children is a qualifying child under section 117D, so the 'reasonableness' test in section 117B(6) is not applicable here.

48. I am concerned, on the facts, only with the best interests of the appellant's two children with his former partner, who came to the United Kingdom as a refugee but now has

indefinite leave to remain. The appellant's current relationship is with his new British citizen partner, not with his former partner.

49. The appellant's former partner has a recurrent depressive disorder, anxiety, and obsessive compulsive disorder, as well as post-traumatic stress disorder. She takes oral antidepressants. When she came to the United Kingdom in 2014, the appellant's former partner was able to detach herself from her abusive husband and successfully seek asylum here, and she has worked and supported her family, apart from when she was in hospital in April 2019.
50. I note that in the appellant's witness statement, he acknowledges that he is grateful to his former partner for allowing him to see his children. He gave practical support by looking after the children when his former partner was in hospital in 2019 following their separation. A contact arrangement has been in place since July 2019, which now extends to both children of that relationship. Things are calmer between them now. The appellant and his son are close, and his son talks at school about what they do together.
51. The evidence from Mrs Gilbert-Silver at Priory School does not mention the appellant dropping the child off for school or collecting him, contrary to the ex-partner's account. Her account of the relationship between father and son is derived only from what the child says in his reception class about activities with his father which he enjoys.
52. I have considered the medical and independent social worker evidence. Dr Collum, the ex-partner's GP, repeats the appellant's ex-partner's account of her circumstances. Apart from confirming the medication she takes, his letter is hearsay.
53. The evidence of Miss Rebecca Hamblin from the Birmingham and Solihull Mental Health Trust (Perinatal Services) confirms that the ex-partner was suicidal in April 2019 when she had ended the relationship with the appellant. Miss Hamblin's qualifications are not given, nor her role within the Trust. The letter seems to have been written to support the application for 'settled citizenship' made in January 2021 and it is striking for not mentioning the appellant at all. The ex-partner is described as having two children 'that she provides care for'. The Trust is monitoring and reviewing his ex-partner's health regularly because she has frequent depressive episodes.
54. The independent social worker's report records that the appellant stepped in to help his former partner when she was hospitalised 'following suicidal ideation and low mood'. She saw the appellant with the children in the distance for a few minutes, but did not interview him, and she seems completely unaware that far from being a 'hands on father' he is living with his new partner and her baby, albeit with access to the children. Her report focuses on the account given by the appellant's ex-partner: she did not speak to the elder child, nor to the new partner. I am unable to place much weight on this report, although I do accept that the appellant has a role in the life of his children and that family life continues between them.
55. The question for the Tribunal is whether it would be disproportionate to remove the appellant to Albania, having regard to the best interests of his children with his former

partner. The best interests of his children are a primary consideration in the proportionality balance, because he has family life with them which is not affected by section 117B of the 2002 Act.

56. There is no question of those children going to live in Albania, or anywhere else, because they are settled in the United Kingdom and on the path to citizenship. They live with their mother, who is their primary carer and who has the support of the Perinatal Mental Health Team, who clearly regard her as fragile and likely to be badly affected if her right to stay in this country is not confirmed by the grant of citizenship. They make no mention of her dependence on the assistance which the appellant provides. The school letter goes no further than recording that the appellant's small son enjoys his activities with his father and is proud of him. They do not confirm that he takes the boy to and from school.
57. The appellant's relationship with his new partner has not been consistent across the various hearings. That relationship, her pregnancy, and her father's support, were 'the entire focus of the evidence' before the First-tier Tribunal. At the error of law hearing in the Upper Tribunal, Mr Yusuf said that he was not relying on the relationship at all.
58. In submissions and in his witness statement for the remaking hearing in the Upper Tribunal, Mr Yusuf and the appellant said that he was in a relationship with his current (British) partner still, although the child born to her in March 2020 was not his child. The current partner's father took no part in the remaking hearing, whether by letter or in person. There is no evidence before me about the best interests of that child.
59. I find that the best interests of all three children affected by this appellant's removal are to be with their respective mothers. They are all very young and although family life between the appellant and his 5-year old son is accepted, that is not sufficient where a child is not a qualifying child.
60. The appellant is not a refugee. He has been in the United Kingdom for 9 years without leave. He accepts that he cannot meet the requirements of the Rules. The question is whether there are exceptional circumstances for which he ought to be given leave to remain outside the Rules. In contrast to the First-tier Tribunal hearing, the hearing before the Upper Tribunal relies on the mental state of the appellant's former partner, but I note that apart from her hospitalisation in April 2019, she has been able to keep working, and that she is under the care of the Perinatal Mental Health Team. If further help is required, she would be able to approach social services for increased support.
61. There are no exceptional circumstances in this appeal for which leave to remain should be given outside the Rules.
62. The appellant's appeal is dismissed.

DECISION

63. For the foregoing reasons, my decision is as follows:

The making of the previous decision involved the making of an error on a point of law.
I set aside the previous decision.

I remake the decision in this appeal by dismissing the appellant's appeal.

Signed *Judith AJC Gleeson*
Upper Tribunal Judge Gleeson

Date: 17 May 2021