IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2021-001861
First-tier Tribunal No:
HU/16491/2021

THE IMMIGRATION ACTS

Heard at Field House IAC
On the 16 November 2022

Decision & Reasons Promulgated
On the 06 February 2023

Before

UPPER TRIBUNAL JUDGE SMITH
DEPUTY UPPER TRIBUNAL JUDGE MALIK KC

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

M H Y (ALGERIA)
[ANONYMITY DIRECTION MADE]

Respondent

Anonymity
Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008
An anonymity order was made by the First-tier Tribunal. Although it is not entirely clear to us why this was thought necessary or appropriate, as the appeal is linked to Family Court proceedings and neither party sought to lift the anonymity order, we are satisfied that it is appropriate to continue the order. Unless and until a Tribunal or court directs otherwise, the Appellant [MHY] is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies, amongst

others, to both parties. Failure to comply with this direction could lead to contempt of court proceedings.

Representation:
For the Appellant: Mrs A Nolan, Senior Home Office Presenting Officer
For the Respondent: Ms K Joshi, Legal Representative, Joshi Advocates

DECISION AND REASONS

BACKGROUND

1. This is an appeal by the Secretary of State. For ease of reference, we refer to the parties as they were before the First-tier Tribunal. The Respondent appeals against the decision of First-tier Tribunal Judge Moon promulgated on 16 November 2021 ("the Decision"). By the Decision, the Judge allowed the Appellant's appeal against the Respondent's decision dated 9 September 2019 refusing his human rights claim. That claim was made in the context of an application for further leave based on his family and private life in the UK.

2. The Appellant is a national of Algeria. He came to the UK on 11 April 2010 and was granted three years' discretionary leave to remain based on his age (he was seventeen at the time). His leave was subsequently extended by a further six months. His next application for further discretionary leave was refused but following a successful appeal, he was granted further leave based on his Article 8 rights until 9 April 2018. He has had no leave since then as his next application was not made until 23 July 2018. That application, also based on his Article 8 rights, was refused by the decision under appeal.

3. Whilst in the UK with leave to remain, the Appellant entered into a relationship with his now ex-partner ([S]) who is a British citizen. They have a son ([A]) who was born on 25 April 2015. The couple separated in 2016. The Appellant has had no contact with his child since [A] was 18 months old. However, in 2017, the Appellant made an application for such contact in the Family Court. The final order in those proceedings dated 26 November 2018 was that the Appellant was to have no direct or indirect contact with [A].

4. The Appellant has a number of criminal convictions dating from 2014 to 2019 including offences involving the use of Class A drugs and also battery and harassment. The relationship between the Appellant and [S] involved domestic abuse. Despite the Appellant's convictions, when applying for further leave to remain, the Appellant declared that he had no criminal convictions.

5. The Appellant contended that he was unable to participate in the earlier Family Court proceedings due to his incarceration and, via his Probation Officer, made a further application for contact with [A]. Consent was

obtained for disclosure of documents in the Family Court proceedings which included a report from CAFCASS dated 23 February 2021 ("the CAFCASS Report" – [AB/65-71]). The writer of the CAFCASS report did not support any direct or indirect contact.

6. In refusing the Appellant's application, the Respondent did not accept that the Appellant has a genuine and subsisting parental relationship with [A] due to lack of contact. She also concluded that there would be no very significant obstacles to the Appellant's integration in Algeria.

7. The progress of the Appellant's appeal was slow. It was originally listed in December 2019 but was adjourned then and on several subsequent occasions due to the delays in the Family Court proceedings (also caused or exacerbated no doubt by the Covid pandemic). At the time when the appeal came before Judge Moon, the Family Court proceedings were next listed for a final hearing on 22 January 2022.

8. At the hearing which took place before Judge Moon on 4 November 2021, she did not "accept that there was any certainty" that the Family Court proceedings would be concluded in January 2022. On 2 July 2021, at a case management review hearing, she had directed that the substantive appeal hearing should take place on the next occasion. She also directed the Respondent to consider whether to grant the Appellant further discretionary leave to remain in order to allow him to pursue the Family Court proceedings. The Respondent confirmed by letter dated 15 September 2021 that she was not prepared to grant such leave.

9. The Judge did not accept the Appellant's explanation for failing to disclose his convictions ([38]). She concluded that there were no very significant obstacles to the Appellant's integration in Algeria ([41]). Having directed herself to the chronology of the Family Court proceedings and the CAFCASS Report, the Judge then set out the Tribunal's guidance in RS (immigration and family court proceedings) India [2012] UKUT 218 ("RS") which we set out below for ease of reference:

> "1. Where a claimant appeals against a decision to deport or remove and there are outstanding family proceedings relating to a child of the claimant, the judge of the Immigration and Asylum Chamber should first consider:
>
> 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 interest 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?
>
> 2. 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?
>
> 3. Having considered these matters the judge will then have to decide:
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> i) Does the claimant have at least an Article 8 right to remain until the conclusion of the family proceedings?
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> ii) If so, should the appeal be allowed to a limited extent and a discretionary leave be directed as per the decision on MS (Ivory Coast) [2007] EWCA Civ 133?
>
> iii) Alternatively, is it more appropriate for a short period of an adjournment to be granted to enable the core decision to be made in the family proceedings?
>
> iv) Is it likely that the family court would be assisted by a view on the present state of knowledge of whether the appellant would be allowed to remain in the event that the outcome of the family proceedings is the maintenance of family contact between him or her and a child resident here?"

10. In relation to the questions raised by the first paragraph, the Judge accepted that indirect contact could take place if the Appellant were returned to Algeria, but direct contact would be more difficult. She accepted that there were public interest reasons to exclude the Appellant "namely [her] finding that [the Appellant] provided false information on his application and his criminal convictions" but she did not assess those factors to be "compelling". She also considered whether the Family Court proceedings were initiated to delay or frustrate removal. Whilst accepting that the Appellant had leave when he first instituted his Family Court proceedings, she considered that the Appellant's second application and some of the delay in those proceedings was due to the Appellant and that the proceedings were brought in order "to delay or frustrate removal and not to promote the child's welfare" ([68]).

11. The Judge carried out a balance sheet assessment, taking into account also what is said at [3] of the headnote in RS. For reasons set out at [60] to [72] to which we come below, she concluded that it would be "disproportionate to require the appellant to leave the United Kingdom before proceedings in the Family Court have concluded". She therefore allowed the appeal.

12. The Respondent appeals on one ground only. She contends that the Judge has failed to give adequate reasons for her conclusion. The grounds include an assertion that the Judge's findings are in part "somewhat perverse".

13. Permission to appeal was granted by a First-tier Tribunal Judge on 31 December 2021 in the following terms:

> "..2 The Judge made various findings pursuant to RS (immigration and family court proceedings) India [2021] UKUT 00218. These included the following findings, in summary: (1) the appellant's involvement in family court contact proceedings was motivated by his immigration status, (2) the view expressed by CAFCASS was that they were unable to recommend contact between the appellant and his child, (3) the appellant had a historic lack of engagement in family court proceedings and (4) there were delays in resolving the family court proceedings despite a number of adjournments. The judge's assessment of the proportionality of the respondent's decision was based on a finding that the family court proceedings were listed for a final hearing in January and it would be disproportionate for the appellant not to be granted leave for 10 weeks until the proceedings were concluded. However this appeared to be inconsistent with concerns expressed at [28] as to whether the family court hearing would in fact proceed in January given the number of previous adjourned hearings. In reaching this conclusion, the Judge arguably erred in failing to provide adequate reasons as to why in light of all her findings discretionary leave should have been granted.
>
> 3. The Judge arguably erred and permission is granted on all grounds."

14. On 1 November 2022, the Appellant's representative filed what purported to be a Rule 24 response in the following terms:

> "..The following is the appellant's R24 response and request to the court to consider this appeal on the papers as the appeal is now academic:
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> 1. The FTT determination allowed the appeal on the sole basis that the appellant had the pending family court matter at that time.
>
> 2. Currently, the appellant does not have a pending family court matter.
>
> 3. The matter that was pending in the Family court at the FTT hearing has concluded unfavourably.
>
> 4. The appeal is therefore academic."

15. Unfortunately, that email did not reach us until the afternoon before the hearing. However, and in any event, as we pointed out in response, the appeal is at error of law stage on the Respondent's appeal. Unless, therefore, the Appellant were prepared to concede the error of law and invite the Tribunal to set aside the Decision and re-make in the Respondent's favour, it could not be said that the appeal was academic. We come below to the discussion in this regard at the hearing.

16. The matter therefore came before us to determine whether the Decision contains an error of law and, if we so conclude, to consider whether to set it aside. If the Decision is set aside, it is then necessary for the decision to be re-made either in this Tribunal or on remittal to the First-tier Tribunal. We had before us the core documents relating to the appeal, the Appellant's bundle before the First-tier Tribunal ([AB/xx]) and the

Respondent's bundle also before the First-tier Tribunal as well as the Appellant's skeleton argument as before that Tribunal.

DISCUSSION AND CONCLUSIONS

17. We begin with the Appellant's assertion that the appeal has been rendered academic by developments in the Family Court proceedings. Ms Joshi confirmed that the Appellant is to be given no contact whether direct or indirect with [A]. She submitted that the Decision only required the Respondent to grant the Appellant ten weeks' discretionary leave to remain and that period had now expired. As we pointed out, however, the Appellant could still ask for the Decision to be implemented and the impact of that might be to confer leave to remain which might allow the Appellant to make a further application. Ms Joshi very candidly indicated that the Appellant had no basis on which he could seek further leave to remain. That does not mean however that he would not try to obtain such leave by a further application and the impact of the Decision might be to give him status to which he is not entitled.

18. Mrs Nolan confirmed that the Respondent's position was that the appeal could not be said to be academic as things stand unless the Appellant were to concede it. Since the Appellant was not willing to do so, she submitted that the Tribunal ought to consider the Respondent's grounds and reach a conclusion whether there is an error of law. We agreed that this was the appropriate course. Having heard submissions from Mrs Nolan and Ms Joshi, we indicated that we would reserve our decision and provide that in writing which we now turn to do.

19. We begin with the Decision. As we have already indicated, and as is confirmed by the decision granting permission to appeal, many of the Judge's findings were adverse to the Appellant. Those included that he had deliberately sought to hide his criminal convictions when applying for further leave, and that he had issued the second set of Family Court proceedings and had caused some delay in their resolution in order to delay or frustrate his removal. The intention of the proceedings was "not to promote the child's welfare" ([68]). The Judge expressly noted that "the Family Court has concluded that it is not in the child's best interests to spend time with his father" ([64]). The Appellant was found not to have "a meaningful relationship" with [A] (which perhaps overstates the position since the CAFCASS Report indicates that the Appellant has had no contact at all since 2016). The Judge found that contact would be "more difficult from abroad, but not impossible" ([66]). The Judge also found that there were no very significant obstacles to the Appellant's integration in Algeria, that he has had no leave to remain in the UK since April 2018 and that he had criminal convictions.

20. Having reached those findings which were all adverse to the Appellant, the Judge went on to apply the guidance in RS to her findings as follows:

> "67. Applying the above findings to the guidance set out in RS India, I find that the outcome of the family proceedings is going to be material factor in the Immigration decision but not the decisive factor because if the Family Court considered it was in the best interests of his child, it would be possible for the appellant to work towards rebuilding his relationship with his son from Algeria although it would be more difficult.
>
> 68. Overall, I find that there is reason to believe that the family proceedings have been instituted to delay or frustrate removal and not to promote the child's welfare. This is because I have found that the appellant has caused some of the delay within proceedings in the Family Court and I also find that he has not progressed the proceedings with a great deal of commitment, he has not complied with court orders to file evidence, he allowed his first application to be adjourned generally and when he issued his second application, he did not provide evidence that was expected.
>
> 69. I have considered whether the appellant should be granted discretionary leave to remain in the United Kingdom pending the resolution of the Children Act proceedings…"

21. Having set out [3] of the headnote in RS (see [9] above), the Judge continued as follows:

> "70. As stated above, this matter has had three CMRH's, I made my decision in relation to whether it was appropriate to grant an adjournment of the Immigration appeal hearing at the CMRH on 2 July 2021. I have set out the reasons for my decision above.
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> 71. On the issue of whether discretionary leave should be granted, it was submitted on behalf of the respondent that it would be possible for the appellant to attend hearings in the Family Court remotely but it may not be that simple. The Albanian authorities may not consent to the appellant giving evidence from overseas and the appellant may also wish to obtain and file evidence to address concerns which have been raised. In my assessment, it would be more difficult for the appellant to participate in proceedings in the Family Court from abroad.
>
> 72. I also take into account the relative proximity of the final hearing, this has been listed to take place in approximately 10 weeks time. It is relevant to compare this to the amount of time that proceedings in the Family Court have been ongoing which is for two years and three months. This factor is material in my decision. Bearing in mind these timescales, I consider that it would be disproportionate to require the appellant to leave the United Kingdom before proceedings in the Family Court have concluded. My decision is that discretionary leave should be granted to this appellant to cover the period required to deal with his outstanding application in the Family Court."

22. Although not raised directly by the Respondent, as we observed at the hearing, the Judge's conclusions are difficult to square with the grounds of appeal available to the Appellant. The only ground available to the Appellant in this regard is that removal would be unlawful under section 6 Human Rights Act 1998. The Judge had to consider that issue at the date

of the hearing and, of course, it would be relevant if, at that point in time, the Judge considered that removal would breach the Appellant's Article 8 rights even if subsequently that might not be the position. To that extent, the guidance in RS remains applicable albeit through a slightly different lens.

23. We were concerned, however, that the Judge may have approached the outcome entirely through the lens of the RS guidance which related to a previous appeal rights' scheme. Tribunal Judges are no longer able to give directions to the Respondent concerning what form or length of leave should be given. Implementation of an allowed appeal is a matter for the Respondent. All a Judge can do is decide whether removal at the point in time when the appeal is heard would be disproportionate. We accept that in so doing a Judge is entitled to take into account that removal might at some point in the future no longer be disproportionate.

24. We therefore turn to consider why the Judge allowed the appeal and whether her reasons are consistent with the appeal rights which now exist and the guidance in RS and whether those reasons are adequate.

25. At [69] of the Decision, the Judge began her consideration with an assessment whether the Appellant should be granted discretionary leave to remain pending the outcome of the Family Court proceedings. Whilst that might suggest that the Judge was looking at matters from the wrong direction, we accept that she may have intended only to consider whether removal whilst the proceedings were pending would be disproportionate. The wording is not conclusive evidence of any misdirection.

26. We have some difficulty reconciling what is said at [70] of the Decision (which cross-refers to [28] of the Decision) with [72] of the Decision. As the Judge granting permission pointed out, on the one hand the Judge refused to grant an adjournment because she considered that it could not be said with any certainty that the Family Court proceedings would be concluded in January 2022 but then decided that removal in November 2021 would be disproportionate because it would only be necessary for the Respondent to grant a short period of leave to remain. Those findings are inconsistent.

27. We also have some difficulty understanding the Judge's findings at [72] read alone. The Appellant has remained without leave to remain since April 2018 which includes the entirety of the time since the second set of Family Court proceedings were issued. Given the Judge's finding at [72] of the Decision that the final hearing would be relatively soon (in about ten weeks) it is difficult to understand why a comparison of that time period with the two previous years since the proceedings were issued would lead to a conclusion in the Appellant's favour. What the Judge was required to do was to balance the interference with the Appellant's family and private life against the public interest. It is difficult to understand why an additional period of ten weeks would strengthen the interference

with the Appellant's rights or diminish the public interest in removal, particularly when compared with the two previous years when the Appellant had no right to remain. That is not explained.

28. We accept that the reason given at [71] of the Decision is a relevant consideration. Bearing in mind that what the Judge is considering is whether removal pending the outcome of proceedings would be disproportionate, it must be relevant to take into account any difficulties in progressing the proceedings which would be occasioned by removal. As the Respondent points out, however, the Judge does not set out any evidence which she had in that regard. It is for the Appellant to prove the interference with his rights. There is no reference to any evidence, and we can find none in the Appellant's bundle. In short, what is said at [71] of the Decision is speculative.

29. This is not a case where the child's best interests would be affected by a removal pending the outcome of the Family Court proceedings. The Appellant has had no contact whether direct or indirect with [A] since 2016. Whilst we accept that the Judge was right to say that the Family Court had not yet reached a concluded view on the outcome of the proceedings, it was highly relevant that CAFCASS did not support any contact in the future. The Judge expressly found that, even if contact were to be re-established pursuant to a Family Court order, that could be done from Algeria even if that might be more difficult. The Appellant had remained unlawfully in the UK since the inception of the Family Court proceedings without any identified difficulty and it is difficult to see how being without leave for a further ten weeks or even being removed in that period would strengthen interference with his family and private life or diminish the public interest. The public interest in this case involved not merely a breach of immigration laws but also criminal convictions and a failure to disclose those convictions which impacted, as the Judge found, on the Appellant's suitability to remain. In short, it is very difficult to ascertain how the Judge's reasoning could have led on any view to the conclusion she reached.

30. We are conscious of the need to avoid imposing our own view of the case on the Decision. We are concerned with whether the Decision contains an error of law and not whether we would have reached a different conclusion. However, once one strips out the speculative finding and the inconsistencies in the reasoning as identified above and having regard to the adverse findings made, we are satisfied that the Respondent has identified an error of law as pleaded. The Judge's reasons are inadequate.

31. For those reasons, we conclude that the Decision should be set aside. We agree with Mrs Nolan however that the findings made at [33] to [68] of the Decision can be preserved.

32. In light of the Appellant's Rule 24 response, neither party sought a further hearing in order to re-make the Decision. The basis on which the

Appellant argued that he should be permitted to remain was in order to pursue the Family Court proceedings. Those proceedings have now been concluded. The Appellant has not been given any contact with [A]. Those proceedings and their outcome no longer have any impact on the Appellant's right to remain.

33. Drawing together the findings made by Judge Moon which we have preserved and having regard to the evidence before the Tribunal which we have read, the Appellant would fail in any application within the Immigration Rules ("the Rules") based on his Article 8 rights on suitability grounds due to his failure to disclose his criminal convictions. There are no very significant obstacles to his integration in Algeria. Paragraph 276ADE(1)(vi) of the Rules is not met. The Appellant has no genuine and subsisting parental relationship with [A]. He is therefore unable to succeed within the Rules.

34. Outside the Rules, we conduct a balance sheet assessment between the interference with the Appellant's rights and the public interest having regard also to section 117B Nationality, Immigration and Asylum Act 2002 ("Section 117B").

35. The Appellant has been in the UK since 2010, then aged seventeen years. We accept that he had leave to remain for eight years thereafter. He is now aged twenty-nine years. However, he grew up in Algeria and has family members there. There is no evidence that he has any medical conditions. He says that he cannot read or write. However, there is evidence that he has worked for Uber in the UK and there is no reason why he could not find a similar occupation or other unskilled work in Algeria. The Appellant says that he maintains contact with his former foster parents in the UK and has a girlfriend here but there is no evidence from any of those persons in his support. He speaks English but that is a neutral factor (Section 117B (2)). We accept that the Appellant worked when he was able to (and when he was not in prison) and that he is no longer permitted to do so. We do not know how he is maintaining himself at present, but we do not suggest that he is not financially independent (Section 117B (3)). Again, however, that is a neutral factor.

36. The Appellant has formed his private life whilst here with precarious immigration status and then without leave and unlawfully. As such, we can give that private life little weight (Section 117B (4) and (5)). We recognise that this does not mean that it should be given no weight but the weight we are able to give it depends on the evidence which is lacking in this case. The Appellant is no longer in a relationship with [S] so the fact that this was formed when he was here lawfully cannot impact on the interference side of the balance. The Appellant says that he is in another relationship, but we have no evidence about the immigration status of his partner nor when the relationship was formed so we cannot take that into account.

37. On the public interest side of the balance, the Appellant has no basis of stay in the UK (as Ms Joshi candidly accepted). He cannot meet the Rules for the reasons we have already set out. The maintenance of effective immigration control therefore favours his removal (Section 117B (1)). In addition, the Appellant has a number of criminal convictions and is prevented from contact with [A] largely due to previous incidents of domestic violence. We consider that the public interest is strengthened by those factors.

38. Balancing interference with the Appellant's Article 8 rights against the public interest on the evidence we have, we have no hesitation in concluding that his removal is both justified and proportionate.

39. For those reasons, we dismiss the appeal.

CONCLUSION

40. We have found there to be an error of law in the decision of First-tier Tribunal Judge Moon promulgated on 16 November 2021. We set that decision aside in consequence, but we have preserved the findings made at [33] to [68] of the Decision. Having considered the evidence before us, we re-make the Decision and dismiss the appeal.

DECISION

We are satisfied that the Decision involves the making of a material error on a point of law. The Decision of First-tier Tribunal Judge Moon promulgated on 16 November 2021 is set aside.

We re-make the decision. We dismiss the appeal.

Signed L K Smith Dated: 28 November 2022

Upper Tribunal Judge Smith