Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/02554/2016

THE IMMIGRATION ACTS

Heard at Liverpool	**Decision & Reasons Promulgated**
On 15 August 2017	**On 17 August 2017**

Before

UPPER TRIBUNAL JUDGE GLEESON

Between

HASSAN ALAIDAROS

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mrs S Ashraf, with Lee Dat & Baig, solicitors
For the Respondent: Mr C Bates, a Senior Home Office Presenting Officer

ORDER

1. The appellant, a citizen of Yemen, appeals with permission against the decision of the First-tier Tribunal dismissing his appeal against the decision of the respondent to refuse him further leave to remain in the United Kingdom on human rights grounds based on ongoing proceedings in the family courts.

Background

2. The following facts and matters concerning the appellant's immigration history and marital problems emerge from the refusal letter of 11 January 2017 and the evidence before the First-tier Tribunal.

3. The appellant last entered the United Kingdom on 3 September 2005. His parents, siblings and other family members remain in Yemen and the appellant is in constant telephone contact with them.

4. The appellant still requires an interpreter when giving evidence, despite having been in the United Kingdom intermittently for 16 years, but speaks fluent Arabic. All of the rest of his family are in the Yemen. He has no health problems.

5. The appellant first came to the United Kingdom in 2001 on a student visa and had valid leave as a student until 31 January 2009, returning to the Yemen once during that period, travelling on his own Yemeni passport. While in the United Kingdom, he says that he has achieved a Masters degree in Information Technology. On the last day of his student leave, 31 January 2009, the appellant made an application for post-study leave, which was unsuccessful.

6. The appellant said his only criminal convictions were for 3 traffic offences, for each of which he had been fined, leading to his choosing not to drive thereafter 'as I want to live legally': he knew he had done wrong.

7. The appellant has a former partner in the United Kingdom. It is not clear what is her nationality. Their son was born on 16 July 2006 and is now 11 years old. The appellant has not seen his son now for over 5 years, since the boy was 6 years old. The relationship between the appellant and his wife broke down during an altercation in February 2012 which led to the police being called. The appellant was not prosecuted. However, the breakdown of the marriage was permanent.

8. The appellant claimed asylum on 11 March 2012, saying that as a Wahabi, he and his family were at risk on return to Yemen from terrorists, specifically from Al-Qaeda. That application was unsuccessful. The appellant did not appeal. He told the First-tier Tribunal Judge that he did not renew his asylum claim because 'I did not want to have to move from the Council house I was given and did not want to lose my jobseeker's allowance'.

9. On 4 April 2012, the appellant was granted discretionary leave on the basis of family life and contact with his son, to expire on 20 March 2015. In May 2012, he told Social Services that his wife was a potential danger to their son, resulting in Court proceedings and the end of the appellant's direct contact with his son. The Family Court proceedings have continued, intermittently, since 2012, without any favourable outcome for the appellant's contact with his son, which is presently 'postal only'.

Refusal letter

10. On 10 May 2014, the appellant made a human rights application based on an application to the Barnet Family Court, in which he was represented by Andrew Jackson & Co, solicitors. In those proceedings, the applicant sought contact with his son, his marriage having failed. His son was living with the appellant's wife and the appellant had not seen him for 2 years by then. The appellant has never provided any court documents from those proceedings.

11. On 10 December 2015, the respondent wrote to the appellant and his immigration solicitors, Christian Gottfried & Co, seeking the outcome of the Family Court proceedings. No response was received.

Refusal letter

12. In her refusal letter of 11 January 2016, the respondent accepted that the appellant met the suitability requirements of paragraph R-LTRPT.1.1. of Appendix FM but not that he met the eligibility requirements in paragraph E-LTRPT.2.4, as he could not show that he had sole responsibility for his son, that his son normally lived with the appellant, or that he had direct access in person to his child. The application under the Parent route failed.

13. The respondent considered private life under paragraph 276ADE of the Rules but the appellant had spent only 10 years in the United Kingdom, not 20 years as the Rules required, and she did not accept that there were very significant obstacles to the appellant's return to Yemen, or that he had a family life in the United Kingdom. The respondent also refused the application on private life grounds.

14. The respondent considered whether there were any exceptional circumstances for which she should consider granting leave to remain outside the rules, but none had been raised and the respondent also refused to grant the appellant leave to remain outside the Rules.

15. The appellant appealed to the First-tier Tribunal.

First-tier Tribunal decision

16. The appellant was unrepresented at the First-tier Tribunal hearing. He did not seek an adjournment. The judge took particular care to ensure that that the appellant understood the proceedings. The appellant gave oral evidence and made submissions.

17. The appellant's grounds of appeal were, first, that it was unsafe for him to return to Yemen because of the civil war and risk of terrorism there. That is a protection claim, but the appellant had not challenged the refusal of his previous asylum claim or made any new protection claim.

18. The appellant's second ground was that to remove him would breach his Article 6 ECHR rights with regard to his ongoing Court proceedings. He told the Tribunal

that there was a further hearing listed, described as a 'dispute resolution appointment' on 9 December 2016, just 8 days after the First-tier Tribunal hearing.

19. The First-tier Tribunal Judge dismissed the appeal on the basis that there were no very significant obstacles to the appellant's return to Yemen, that he could continue his indirect postal contact with his son from there, and that there was no evidence that it would be disproportionate, or have an adverse effect on the child. Nor was there any evidence that the child's section 55 best interests would be affected by the appellant's removal. The appellant had not shown that the child, or his mother, were British citizens.

20. Although the appellant's child was a qualifying child as defined in section 117D of the Nationality Immigration and Asylum Act 2002 (as amended), the evidence did not establish that the appellant had a genuine and subsisting relationship with the child, nor that, even if he had, as the child was not British, it would be unreasonable to expect him to leave the United Kingdom if his father were removed.

21. As regards exceptional circumstances, the judge said this:

> "23. I am not persuaded on the evidence presented that there are compelling circumstances not sufficiently recognised under the Rules for granting leave to remain. Even if the refusal prejudices private or family life of the appellant and others in a manner sufficiently serious to amount to a breach of the fundamental right protected by Article 8, I am also satisfied that the interference is in accordance with the law because the appellant has no other right to remain in the United Kingdom in the circumstances appertaining at the date of decision. Furthermore I conclude that, given that a state has a right under international law to control the entry of non-nationals into its territory, in this case on performing the necessary balancing exercise, any interference would not be disproportionate in achieving the maintenance of a fair and just immigration policy which it is necessary for the United Kingdom Government to maintain.
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> 24. I therefore conclude that refusing the appellant leave to remain in the United Kingdom would not place the United Kingdom in breach of its obligations under Article 8 of the ECHR. "

22. The appeal was dismissed.

Permission to appeal

23. The appellant appealed. The appellant's case now, which has not been put to the respondent or the First-tier Tribunal, is that his former partner had a history of suicide attempts before they married, that she considered aborting their son when she became pregnant, but changed her mind, and that after his birth she neglected and abused the child, so that the appellant became his primary carer. She also 'strangled [the appellant] without any reason…to discharge her depression'. CAFCASS reported that the child had missed 18 months of schooling, for 4 of which a place was available for him at a school.

24. The appellant says that the child's mother refused to get involved in his son's feeding or upbringing, and that she stayed up all night, slept all day, and was either sick or out with friends. After the boy was 2 years old, both the child and his father slept in a different room and the appellant was the child's main carer. The appellant says the child speaks English, but his mother speaks only Arabic and taught Arabic at a Saudi school for 2 years.

25. In March 2012, after the final altercation between the mother and the appellant, the appellant moved to Liverpool without his child or the mother, but returned to stay with them 4-5 days a week, witnessing the fights between them before school each morning. During 'the last week' the child whispered to his father that his mother had tried to kill him.

26. On 9 May 2012, the child and his mother moved to a women's aid refuge. The appellant says this was 'a deal with her case worker to get high priority in Council housing'. The mother now lives in London with the child, still in a women's aid refuge.

27. In the statement that accompanied his grounds of appeal, the appellant stated that he had taken a 6-month self-employment course in Liverpool, which the Family Court recommended him to take, and was ready to start work once he received indefinite leave to remain in the United Kingdom. His former partner had indefinite leave already and he was reasonably sure that his son would have been granted leave in line.

28. Permission to appeal was granted by Upper Tribunal Judge Kebede, who considered that there was arguable merit in the assertion in the grounds of appeal that the First-tier Tribunal Judge erred by failing to undertake a more detailed assessment of the appellant's position with regard to the family law proceedings, having regard to the guidance given by the Court of Appeal in *MS (Ivory Coast) v Secretary of State for the Home Department* [2007] EWCA Civ 133, especially as the appellant had previously been given a period of discretionary leave on the basis of his contact with his son. The appellant also relied in his grounds on *JA* (meaning of 'access rights') India [2015] UKUT 00225 (IAC).

Rule 24 Reply

29. The respondent served a reply to the grant of permission, arguing that:

> "2. In summary, the respondent will submit *inter alia* that the Judge of the First-tier Tribunal directed [herself] appropriately. The appellant had failed to furnish any evidence on the face of the determination to suggest that the appellant has had any direct contact with his son or that his family proceedings would be prejudiced by a dismissal, given he has only ever had indirect contact.
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> 3. However, it is accepted that the judge would have had to have given consideration to the family proceedings in light of the appellant's imminent hearing

(*MH* (pending family proceedings – discretionary leave) Morocco [2010] UKUT 439 (IAC)).”

30. That is the basis on which this appeal came before me for hearing.

Upper Tribunal hearing

31. For the appellant, Mrs Ashraf relied on the grounds of appeal and argued that the First-tier Tribunal should have taken more account of the Family Court proceedings. Her firm, Lee Dat & Baig, had begun to act only at the Upper Tribunal renewal stage. She contended that the ongoing proceedings should have led to a grant of discretionary leave until the contact proceedings were concluded. The appellant should not pay the price for failing to produce the family proceedings in the immigration appeal. Lee Dat & Baig had now written to the Family Court on 19 or 20 July 2017 seeking information on the proceedings but had not yet had a response.

32. For the respondent, Mr Bates reminded the Tribunal that the appellant was represented by Christian Gottfried solicitors in December 2016, when the refusal letter was written. It was not clear when they had ceased to act, but the appellant represented himself at the First-tier Tribunal and there was no adjournment request.

33. The grant of discretionary leave was on the basis of a fact set which had changed very quickly thereafter. The application to the Upper Tribunal was in May 2017 and there had been ample time for details of the Family Court proceedings to be produced, or for the Tribunal to be asked to use the Family Court Protocol to obtain information directly from the Court. The First-tier Tribunal decision was based on the evidence before it and was open to the judge, for the reasons he gave.

34. Should the Family Court proceedings be resolved in the appellant’s favour it was open to him to make a new application, or indeed, to make further submissions based on a fuller disclosure of the Family Court proceedings.

Discussion

35. I begin by considering the guidance given in the three cases relied upon by the appellant and respondent: *MS (Ivory Coast) v Secretary of State for the Home Department* [2007] EWCA Civ 133, *JA* (meaning of ‘access rights’) India [2015] UKUT 00225 (IAC) and *MH* (pending family proceedings – discretionary leave) Morocco [2010] UKUT 439 (IAC)

36. In *MS (Ivory Coast),* Lord Justice Scott-Baker, giving the judgment of the Court, considered the case of a mother who had not seen her children for four years, and who was actively seeking to renew contact in Court proceedings. The Asylum and Immigration Tribunal had accepted an undertaking from the Secretary of State that the appellant would not be removed and would be given temporary admission pending the outcome of the contact proceedings. At [70]-[72], he said this:

> “70. In our judgment the AIT did not decide the hypothetical question it was incumbent upon it to decide, namely whether the appellant's Article 8 rights would be

violated by a removal when the case was before it i.e. when the contact application was outstanding. Time has moved on. It is now 9 months since the AIT's decision. The circumstances will be different. The AIT will need to know what has happened in the contact proceedings. One can envisage arguments both ways. Mr Bourne points out that the facts are some way removed from those in *Ciliz*. The appellant has served a lengthy prison sentence for physical abuse of her children and, as far as we are aware, has not seen them for some time. The present views of the children and their father are unknown. If the AIT had decided the question it should have decided, and concluded that her Article 8 rights would be violated by her removal, then the next question would have been the length of discretionary leave to remain and quite a short period might have been appropriate to cater for the outstanding contact proceedings; it could of course always be extended. The AIT had jurisdiction to decide this issue (see s 87 2002 Act).

71. Whilst it is correct, as the authorities show, that the decision maker is, to an extent, required to consider a hypothetical situation, it is neither required nor appropriate to speculate about the future. Thus questions about what may happen, for example, to the appellant's mental health in circumstances as yet unknown were irrelevant to the AIT's consideration.

71. The appellant was entitled to have determined whether removal from the United Kingdom with an outstanding contact application would breach s 6 of the Human Rights Act 1998. That question was capable of resolution one way or the other. What was not appropriate was to leave her in this country in limbo with temporary admission and the promise not to remove her until her contact application has been concluded. Temporary admission is, as we have explained, a status given to someone liable to be detained pending removal. If the appellant had a valid human rights claim she is not liable to be detained pending removal. And if she has not, she ought to be removed. If she is entitled to discretionary leave to remain she ought to have it for the period the Secretary of State thinks appropriate, together with the advantages that it conveys; and if not she ought not to."

The appeal was allowed and remitted to the AIT for remaking.

37. In *JA (India),* Upper Tribunal Judge Clive Lane held that 'access' and 'contact' are legally identical. In the judicial headnote at [4], the Tribunal gave the following guidance:

"4. *Having satisfied the requirements of paragraph E-LTRPT.2.4 (a) (i), an appellant must still prove that he/she "is taking and intend to continue to take an active role in the child's upbringing"(paragraph E-LTRPT.2.4 (a) (ii)). Whether he/she will be able to do so will depend upon the evidence rather than the nature of the "access rights." However, it is likely to be unusual that a person having only "indirect" access rights will be able to satisfy this provision. In some cases, Tribunals may need to examine the reasons why the Family Court has ordered "indirect" rather then "direct" access.*"

38. Finally, in *MH (Morocco),* Upper Tribunal Judge Jarvis gave the following guidance:

"1. In MS (Ivory Coast) [2007] EWCA Civ 133 it was accepted, following Ciliz v Netherlands (Application no. 29192/95) [2000] ECHR 365; [2000] FLR 469, that a decision to remove an applicant in the process of seeking a contact order may violate Article 8 ECHR, in particular on the basis that removal of a parent/applicant during contact order proceedings would be unlawful because it prejudged the outcome of the contact proceedings and, more

importantly, denied the applicant all possibility of any further meaningful involvement in the proceedings which may breach Article 6 ECHR.

2. A refusal to adjourn proceedings before the Tribunal may have similar consequences.

3. It is the respondent's practice (consistent with the Human Rights Act 1998), not to remove or deport parent(s)/parties when family or other court proceedings are current and to grant short periods of discretionary leave, to extend temporary admission, or release a person pending the outcome of the family proceedings. The use of curtailment is discretionary in such circumstances (see Home Office Guidance re-issued in October 2010).

4. Where such a case arises before the Tribunal it is usual for the appeal to be allowed pursuant to Article 8 ECHR , rather than for the proceedings to remain within the Tribunal system to be adjourned, perhaps more than once. The respondent will normally then grant a short period of discretionary leave bearing in mind any relevant facts found by, or observations of an Immigration Judge. It is for the respondent to decide on the period of leave in each case.

5. Where an application for contact (or a residence order, or for other relief) is successful then a parent/party may make application for further leave to remain in the UK. If unsuccessful, then it will be for the respondent to consider what steps to take in relation to that individual."

39. That is the legal background against which this appeal fell to be decided. I do not find that the decision in *MH (Morocco)* correctly re-states the guidance in *MS (Ivory Coast)* or that it takes account of the guidance in *JA (India)* that the decision will always be fact-specific. I am not greatly assisted by the remainder of the *MH* guidance, which revisits Home Office guidance already considered and taken into account by the Court of Appeal in *MS (Ivory Coast).*

40. I extract the following principles from *MS* and *MH*:

- The question for the Upper Tribunal is whether removal from the United Kingdom with an outstanding contact application would breach s 6 of the Human Rights Act 1998, that is to say, applying *MS (Ivory Coast),* whether there is a valid human rights claim.

- If the grant of leave is appropriate, applying *MS (Ivory Coast),* it should be discretionary leave not temporary admission.

- If a parent can satisfy the requirement of E-LTRPT 2.4 that he is taking and will continue to take an active part in a child's upbringing will be a question of fact in each case. It is likely to be unusual that a person having only "indirect" access rights will be able to satisfy this provision.

- In some cases, Tribunals may need to examine the reasons why the Family Court has ordered "indirect" rather then "direct" access.

41. I apply those principles to the evidence which was before the First-tier Tribunal, noting that the appellant's evidence does not contain any indication of the factual matrix underpinning the Family Court proceedings or include any of the evidence before or orders made by the Family Court.

42. I place little weight on the matters alleged in the latest grounds of appeal, which are not supported by Family Court documents or an application for the Family Court Protocol to obtain such documents. It seems to me most unlikely that the appellant's wife would still be in a women's aid refuge miles away in London, 5 years after they split up, if she is the one who is a danger to the child.

43. The plain facts are that this appellant has had only postal contact with his son for half of that child's life, and has not provided any external evidence to explain why, over 5 years after the end of the marital relationship, his wife and/or the Family Court refuse to allow him to resume direct contact, or, indeed, whether that is what the child himself wishes. The appellant has had solicitors in the Family Court proceedings, as well as for most of the time in the immigration proceedings and it would have been possible for that information to be provided. I am not satisfied on that evidence that the appellant had shown that his removal would breach the United Kingdom's international obligations under Article 8 ECHR.

44. It is right that the First-tier Tribunal erred in law by applying the middle, 'serious grounds' standard to this appeal. However, the appeal failed, even at that more demanding standard. It also fails at the basic level of protection.

Conclusions

The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law. I set aside the decision. I remake the decision by dismissing this appeal.

Signed: *Judith A J C Gleeson* Date: 16 August 2017

Upper Tribunal Judge Gleeson