Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: PA/07577/2017**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 19 November 2018	**On 30 November 2018**

Before

UPPER TRIBUNAL JUDGE FINCH

Between

[S K]

Appellant

-and-

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mrs H. Arrif of counsel, instructed by Ardens Solicitors Advocates

For the Respondent: Ms. J. Isherwood, Home Office Presenting Officer

DECISION AND REASONS

BACKGROUND TO THE APPEAL

1. The Respondent is a national of Iraq. He arrived in the United Kingdom and applied for asylum in July 2007. His application was refused on 24 July 2007 and he did not appeal against this decision. He made further representations in March 2013, which were accepted as

a fresh claim for international protections. However, this application was also refused on 28 June 2017.

2. The Appellant appealed against this decision on 17 January 2018 and his appeal was heard and dismissed by First-tier Tribunal Judge Greasley in a decision promulgated on 25 June 2018. The Appellant appealed against this decision and on 17 July 2018 First-tier Tribunal Judge Kelly granted him permission to appeal.

3. Meanwhile, he had started a relationship with a British woman in 2009 and they married in 2012. They had two children together. The first was born in December 2010 and the second in February 2012. They divorced in February 2016 and the children remained living with her. In March 2016, the Appellant's ex-wife wrote to the Respondent alleging that he had only had a relationship with her in order to obtain British citizenship. She also refused to allow the Appellant to continue to have direct contact with his children.

4. The Appellant applied for a Child Arrangement Order in August 2017 in order to have direct contact with his children. There were a number of hearings at the Family Court in Croydon and there was supposed to be a final hearing on 27 June 2018.

5. At the hearing before First-tier Tribunal Judge Greasley on 13 June 2018, the Appellant's legal representative confirmed that the Family Court had not given permission for documents from the family proceedings to be disclosed to the Tribunal.

6. When the appeal came before Deputy Upper Tribunal Judge Jordan on 17 September 2018, he directed the Appellant to apply to the Family Court for the release of the relevant papers to the Upper Tribunal.

7. On 7 November 2018, the Appellant applied for an adjournment of the hearing set down for today on the basis that he had not been able to obtain the relevant documents from the Family Court and the fact that a final hearing in the Family Court was now listed for 7 January 2019. This application was not put before an Upper Tribunal Judge before the hearing.

8. However, the Family Court in Croydon disclosed a number of Cafcass reports to the Upper Tribunal on 14 November 2018.

ERROR OF LAW HEARING

9. Counsel for the Appellant did not renew the application for an adjournment at the hearing and both she and the Home Office Presenting Officer made oral submissions, which I have taken these into account, where they were relevant, in my findings below.

ERROR OF LAW DECISION

10. The grounds of appeal submitted by the Appellant do not challenge the decision by First-tier Tribunal Judge Greasley to dismiss his asylum appeal and to find that he was not entitled to Humanitarian Protection.

11. The sole ground of appeal was that the First-tier Tribunal should not have found that no breach of Article 8 of the European Convention on Human Rights arose in the absence of a final decision by the Family Court.

12. When considering this issue, notice should have been taken of section E-LTRPT of Appendix FM to the Immigration Rules that provides for limited leave to remain as a parent to be granted if certain conditions are met.

13. The Appellant could potentially meet some of the conditions contained in paragraph E-LTRPT.2.2 as his children are under 18, are living in the United Kingdom and are British citizens. He can also meet the requirements of paragraph E-LTRPT.2.3, as the children normally live with his ex-wife who is a British citizen and he is not entitled to apply for leave to remain as her partner, as they have divorced/separated.

14. However, in order to meet the conditions in paragraph E-LTRPT.2.4 he would also have to show that he has direct contact with his children and that he was taking and intending to continue to take an active role in children's upbringing and that he could meet the immigration status requirement, which he currently cannot.

15. Nevertheless, the extent to which he could meet the requirements of these Rules would be a factor when considering whether to grant him leave to remain outside the Immigration Rules.

16. The Home Office Presenting Officer relied on the case of *Secretary of State for the Home Department v GD (Ghana)* [2017] EWCA Civ 1126, which confirmed that, even if the Family Court does make a residence order in favour of a migrant, that does not oblige the Secretary of State for the Home Department to grant him leave to remain in the United Kingdom. However, even if this is the case, the Upper Tribunal has previously confirmed that certain procedures must be complied with where there are parallel Family Court and Immigration Tribunal proceedings.

17. In particular, in *RS (Immigration and Family Court proceedings) India* [2012] UKUT 00218 (IAC) the Upper Tribunal found that:

> "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:
>
> i) Does the claimant have at least an Article 8 right to remain until the conclusion of the family proceedings?

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?"

18. The Appellant had informed First-tier Tribunal Judge Greasley that there were on-going Family Court proceedings in the Family Court in Croydon and that a full fact-finding hearing had been set down for 27 June 2018, some two weeks after the hearing before the First-tier Tribunal and he accepted that this was the case.

19. The First-tier Tribunal Judge did not remind himself of the guidance provided in *RS* and consider whether the decision in the family court was likely to be material to the Appellant's human rights claim. Instead, he based his decision on the fact that in the last three years the role that the Appellant had played in his children's lives had been minimal.

20. He also failed to consider whether there were compelling public interest reasons to exclude the Appellant from the United Kingdom irrespective of the outcome of the family proceedings or the best interests of the children. The Appellant was not subject to a deportation order and there was no evidence to suggest that he posed any sort of risk to the public. In relation to a potential risk to the Appellant's ex-wife, First-tier Tribunal Judge Greasley appeared to accept, in paragraph 69 of his decision, that the content of the letter his ex-wife she wrote to the Respondent was to be preferred to the account given by the Appellant. The proper forum for such fact-finding is the full hearing of the Family Court case and it was premature for the First-tier Tribunal Judge to making a finding.

21. He also failed to consider whether the application for a Child Arrangements Order had been made in order to delay or frustrate the Appellant's removal and not to promote the children's best interests. It was not necessary for the First-tier Tribunal Judge to look at the Family Court papers as it was clear from the chronology before him that the Appellant had started a relationship with the children's mother in 2009 and lived with her until February 2016.

Therefore, he had lived with his children for a number of years. This was not a case in which an appellant attempted to have initial contact with his children for immigration purposes. This should have been weighed in the balance with the fact that the Appellant applied for a child arrangements order after he had been refused asylum and leave to remain. He should also have taken into account the fact that the Appellant had continued to attend Family Court proceedings from August 2017 and to actively participate in those proceedings.

22. The First-tier Tribunal Judge should also have considered whether he and the children's right to continue to enjoy a family life together justified him being permitted to remain until the Family Court had reached its decision. This was in the context of the Appellant's legal representative not applying for an adjournment.

23. Furthermore, the fact that the account given by the Appellant in his asylum appeal had not been believed, did not necessarily mean that he could not have a parental relationship with his children which included direct contact or that it may not be in their best interest for this direct contact to continue.

24. As a consequence, the decision by First-tier Tribunal Judge Greasley did contain errors of law and should be set aside.

DECISION

(1) The appeal is allowed.

(2) The appeal is remitted to the First-tier Tribunal to be heard *de novo* by a First-tier Tribunal Judge other than First-tier Tribunal Judge Greasley or First-tier Tribunal Judge Kelly.

Nadine Finch

Signed Dated: 19 November 2018
Upper Tribunal Judge Finch