



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

Appeal Number: HU/17014/2019

THE IMMIGRATION ACTS

**Heard at Field House via Skype for
Business
On 12 August 2020**

**Decision & Reasons
Promulgated
On 7 September 2020**

Before

UPPER TRIBUNAL JUDGE ALLEN

Between

**F H
(ANONYMITY DIRECTION MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr J Collins, instructed by Marsh and Partners Solicitors

For the Respondent: Mr T Melvin, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appeals to the Upper Tribunal with permission against the decision of a Judge of the First-tier Tribunal who dismissed his appeal against the respondent's decision of 3 October 2019 refusing his application for leave to remain on the basis of family and private life.
2. The appellant said he came to the United Kingdom illegally in November 2013 and has remained here thereafter. In March 2016 he said he began a relationship with MS, an Albanian woman. She was aged 17 at the time

when they met. In around September 2016, when she was 5 months pregnant, she ended their relationship. Their son J was born on 23 December 2016 and the appellant said he was present at the birth.

3. On 2 October 2018 MS gave birth to a second son, R. The appellant said he was again present at the birth but said he was not R's father. It is said that R's father is AP, who together with MS registered R's birth on 9 October 2018. On 30 October 2018 MS obtained a UK passport for R.
4. The appellant claimed that a month after R's birth he and MS resumed their relationship and he became R's de facto father. Subsequently MS obtained limited leave to remain in the United Kingdom, until 1 July 2021, on the basis that she was the mother of a British citizen child. J was granted limited leave to remain in line with her. J's birth was registered by the appellant and MS on 21 May 2019.
5. In the current application, which is dated 18 June 2019, the appellant said that he and MS had been in a relationship from March 2016 and then they had problems as she was going out with the father of her second child but he abandoned them and she returned back to him and he was very happy about this as he had always loved her.
6. The judge heard oral evidence from the appellant and the sponsor. The appellant confirmed the above account of the relationship and the timing of events. MS had ended their relationship because he did not have a job and did not have leave to remain in the United Kingdom and also they were living some distance apart. MS had become pregnant with R unintentionally as a result of a one-night stand. The appellant had been at the hospital when R was born and a month later he was helping to look after J and they got back together. MS had told him she was not in touch with R's father. He did not live with MS but visited five to six times a week and helped her to look after R. They were not living together because he could not work. MS and the children were in a one bedroom flat paid for by the local authority.
7. He was able to name R's father. MS had told him that R's father was a UK citizen and he had seen R's passport and the name of his father. As far as he knew, MS had not seen R's father since his attendance when the birth certificate was issued and he had helped MS with the paperwork.
8. In her evidence MS said that she had moved into her current flat in December 2019 and it was paid for by Social Services and she was in receipt of benefits. She had been out with R's father a few times but they had not been in a relationship as such. After she discovered she was pregnant they talked on the phone but had no interest in seeing each other and she thought that he was probably in a relationship but was unable to say why she thought this. She had not seen R's father since R's birth has been registered. He had never provided any financial support or wanted any contact with R and she had not asked him for money. He had

not shown any real interest in R other than telephoning a few times to ask about his health.

9. The judge set out the relevant legal principles and then went on to consider the evidence in the context of those principles. He referred to the fact that the appellant's representative had sent the respondent a letter on 26 September 2019 which was said to contain further supporting documentation but it did not say what further information was provided. There was a reference to photographs with the child but the judge was not provided with any explanation for this and it remained unclear whether the respondent had been provided with the photographs. The appellant produced a large number of photographs at the hearing showing him with MS and the children over time. The judge accepted that the photographs he saw were consistent with the appellant's account of being in a relationship with MS but considered they could be equally consistent with him having separated from her but continuing to take an active part in J's life. He said there was no independent evidence about the circumstances in which the photographs were taken and photographs could show events that had been staged.
10. As the statements provided by both witnesses were brief the judge considered that his assessment of their reliability as witnesses was based to a significant extent on their oral evidence and other documentary evidence.
11. At paragraph 56 he said that when assessing the appellant's evidence, he took into account that he had come to the United Kingdom unlawfully and remained unlawfully. He stated that the appellant's willingness to ignore immigration law suggested he might be willing to lie in order to remain in the United Kingdom and he therefore needed to treat his evidence with caution where it was not supported by other reliable evidence.
12. He noted that in evidence the couple gave broadly similar accounts about when they met, when they separated, when they got back together and where they were living during this time. He commented that this was consistent with their account being true but remarked that their consistency was somewhat limited. They gave similar accounts about the specific times when specific events occurred but when asked to provide more detail about what had happened and why, their evidence tended to be vague and there were a number of implausible and inconsistent aspects to their evidence. Whereas initially the appellant said that MS had told him she had no contact with R's father after she became pregnant, subsequently he appeared to accept that there had been some contact. The judge considered the appellant's answers were vague with regard to the circumstances in which R's father participated in registering R's birth, saying eventually that as far as he knew, MS had not had any contact with R's father since R's birth was registered. He accepted that given the subject matter it was possible that MS might not have been candid with him. He considered that although the evidence was very consistent with regard to the reason for the ending of the relationship initially, given the

fact that that was still the situation and he now helped out with the children, the judge considered their evidence about this to be limited and superficial and that neither appeared to be able to give any real detail about the circumstances surrounding this important event in their lives. Overall, he found MS's evidence in relation to her contact with R's father after she became aware she was pregnant to be very vague and somewhat evasive. He found it implausible that she would not have asked R's father for some financial assistance given that she initially ended her relationship with the appellant because of a lack of money. The judge found it very implausible that MS's evidence of R's father was that although he was a person with whom she had had a casual sexual relationship, on the basis of a single phone call he accepted without question that he was R's father and agreed to be registered as his father although having had virtually nothing to do with MS or the child before or after the birth.

13. The judge also found the independent evidence the appellant had provided to support his claim that the relationship had resumed in around November 2018 to be limited.
14. The judge had a concern that there was limited evidence only from the local authority which had supported MS throughout the time she had known the appellant and given birth to her two children. There was a letter of 16 October 2019 where the writer stated that she had met the appellant and the father of the baby a few times at their regulated visits and the judge found the letter to be somewhat ambiguous and did not feel able to give a great deal of weight to it. There was also a lack of evidence in the medical records to support the account of MS and that of the appellant. The judge noted that J's nursery registration form showed he was named as a person who could collect J and that was consistent with him taking an active part in J's life but it postdated his application and did not really assist him in respect of his claimed relationship with MS or R. Looking at the evidence as a whole, the judge did not find that the appellant had shown that he was in a genuine and subsisting relationship with MS and had not shown that he had a parental relationship or was taking an active part in R's upbringing.
15. As regards the appellant's relationship with J, the judge found that he had a parental relationship with him and was taking an active part in his upbringing insofar as he saw him regularly. He did not consider the appellant or MS had been honest with him and considered it was therefore difficult to assess what the true situation was in respect of the children and considered he could not make positive findings about this. He said that all he could say was that the appellant had not shown he had a genuine and subsisting relationship with MS or R.
16. At paragraph 81 the judge went on to say that he could not speculate about what the true situation might be but looking at the evidence as a whole there appeared to be a reasonable suspicion that either MS was still in a relationship with R's father or alternatively the appellant was R's

father and the account of R's father being an Albanian born UK citizen was a device to enable both MS and the appellant and their children to obtain leave to remain in the United Kingdom.

17. The judge went on to say that he repeated and emphasised that he did not and could not make findings that either of these possibilities were in fact the true situation and that it would be wrong and unfair to do so merely on the basis of suspicions. He noted that it had not been put to the appellant or MS that R might be the appellant's child. He did not believe however that he was prohibited from identifying what he considered to be reasonable suspicions particularly when they might impact on the welfare of children. He remarked that it was self-evident that if R's birth certificate did not in fact reflect his true paternity there would be a serious breach of his Article 8 rights and not in his best interests. He went on to reiterate that he did not take account of these suspicions when reaching his conclusions and proceeded on the basis that R was a genuine UK citizen as evidenced by his birth certificate. The judge went on to consider whether the appellant met the requirements of the Immigration Rules and concluded that he did not. This was on the basis that his relationship with J could not meet the requirements of paragraph EX.1 of Appendix FM nor did he have a genuine and subsisting relationship with MS and therefore no family life with her within the meaning of Article 8. He went on to consider the effect on R and J of his removal and concluded that he did not find that requiring the appellant to return to Albania would adversely affect R sufficiently to compromise his best interests and that J would be able to maintain a relationship with his father via modern means of communication and visits. He considered there was no or no sufficient evidence to suggest that MS would be unable to cope without the appellant's regular visits to J and that she appeared to have family support in the UK as she was currently working for her cousin and J's nursery application form showed that there was at least one other individual whom she trusted to collect J from nursery on her behalf. The judge concluded that the adverse consequences to J's best interests caused by separating him from his father could be significantly mitigated and the consequences for J and the appellant would not be unduly harsh. At paragraph 108 of his determination he stated that although the suspicions he had identified regarding R's paternity had played no part in his decision he was under a duty to take reasonable steps to promote and safeguard the welfare and best interests of children affected by his decision and given these concerns he requested the respondent to give serious consideration to making a safeguarding referral to the local authority regarding this concern and to provide the local authority with a copy of his decision. In his view the respondent's duty under section 55 of the 2009 Act required this to be done.
18. The appeal having been dismissed, the appellant sought permission to appeal on the basis that at paragraph 56 the judge's remarks about the appellant's willingness to ignore Immigration Rules suggested that he might be willing to lie in order to remain in the United Kingdom was based on no authority and vitiated the determination. It was also argued that

regular references to “suspicion” and “suspicions” at paragraphs 81 to 83 and 108 were based on pure speculation rather than evidence. It was not accepted that the suspicions played no part in the judge reaching his conclusions and it was argued that on any rational view manifestly they did and at the very least the suspicions infected the reasoning process. Consistent with this was the request to the Home Office made at paragraph 108.

19. It was also argued that the rejection of the appellant’s relationship with his partner was irrational and unsustainable and the judge’s comment that the photographs could have been “staged” was irrational and betrayed his flawed approach to the evidence in general. The judge had failed to factor into his assessment of credibility the various points for example at paragraphs 54, 58 and 62 of consistency in the evidence.
20. It is also argued that the judge had not properly reasoned his conclusions about the appellant’s relationship with R and also in failing to address it properly he had not considered the reasonableness of the impact on R of the appellant leaving the United Kingdom. The fact that the judge accepted that the appellant and his partner were clearly telling the truth about the relationship with J had not been properly taken into account in assessing the credibility of the other aspects of the claim.
21. In his submissions Mr Collins relied on and developed the points made in the grounds. The comment at paragraph 56 was indicative of apparent bias and was indefensible and gave rise to real concerns and vitiated the decision. The points of suspicion that were not part of the Home Office case had not been put to the appellant and had clearly infected the reasoning process, hence the paragraph 108 request. A fair-minded observer would consider it was part of the process of reasoning.
22. In his submissions Mr Melvin relied on and developed the points made in his Rule 24 response. He argued that paragraph 56 was to be read holistically. The appellant had not said what he had been doing for the last six years and there was sparse evidence of the relationship. It was open to the judge to consider the appellant’s evidence and when it was not corroborated to treat it with caution. As regards the suspicions the judge referred to, these were qualified by the judge and played no part in his findings of fact. The suspicions with regard to the second child were open to the judge. It was for the appellant to make his case and his claim was parasitic on the sponsor, who herself was parasitic on the British citizen child and the claimed relationship with the child. The claim could only succeed by showing a subsisting relationship with the partner, who had limited leave, and the child on whom she relied for her leave. As regards points made about the photographs, matters of weight were for the judge and he had not ignored the evidence but relied on it, as could be seen at paragraph 79. It was open to the judge to conclude as he did. He had given reasons for the findings he made about the relationship with the second child. The judge had considered the evidence and the decision was fully reasoned. There was no evidence of family members. The

findings were sound. As regards the point about contact with the local authority for the Home Office, the Home Office did not encourage such observations and it was not a direction but it seemed the local authority was satisfied.

23. By way of reply Mr Collins argued that with regard to the appellant's activities while in the United Kingdom this was a Home Office application and he had not been interviewed so he had not had an opportunity to state what he had been doing. His application was based on his relationship with his partner and the two children. If the evidence was sparse then it was all the more important to give objective consideration to the evidence. The point being made about the claim being parasitic betrayed the Home Office's approach and the question was, was it a decision lacking merit. It was not just a matter of the photographs but the consistency of the evidence also and the judge had speculated and conjectured. Looked at holistically ground 3 had force. Ground 4 had not been addressed and it was not clear what the judge thought about that issue, which was undecided. There was a need for a fair balance.
24. I reserved my decision.
25. The judge's decision is a detailed and thorough one. However, it seems to me that there is a particular difficulty with it and that is the matter identified at ground 2. This concerns the judge's views about the potential true situation with regard to the appellant's relationship with R. Although the judge repeated and emphasised that he was not making findings on the possibility that either MS was still in a relationship with R's father or that the appellant was R's father, these are matters not having been put to the parties, nevertheless he considered they were reasonable suspicions albeit he insisted he did not take them into account when coming to his decision. However, there is the point at paragraph 108 where, expressing his concerns, he requested the respondent to give serious consideration to making a safeguarding referral to the local authority regarding his concern.
26. In my view that is fatal to the judge's determination. It would have been better had he not speculated at all about this matter, particularly when, as he noted, it was not a point that had been put to the appellant or to MS, and the fact that he took it sufficiently seriously to make the recommendation that he did at paragraph 108 is indicative of a real risk that it played a material part in his thought process in coming to the adverse credibility findings that he did. As I say, in my view that vitiates the entire decision because it indicates that the judge in assessing the credibility of the witnesses speculated unduly and inappropriately on a material matter. Accordingly, I consider there is a material error of law by the judge in the decision. To a lesser extent I see force in the points concerning his failure to factor in the various stages at which he identified consistency in the evidence to his overall findings on credibility as a whole, but it is essentially in respect of that central point that I consider

the decision must be set aside, and there will have to be a full rehearing before a different judge at Taylor House.

Notice of Decision

The appeal is allowed to the extent set out above.

Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.



Signed

Date 21 August 2020

Upper Tribunal Judge Allen