Upper Tribunal
(Immigration and Asylum Chamber)

Ortega (remittal; bias; parental relationship) [2018] UKUT 00298 (IAC)

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 26 June 2018	.....

Before

THE HONOURABLE MR JUSTICE LANE, PRESIDENT
UPPER TRIBUNAL JUDGE PITT

Between

MR VICTOR OMAR ORTEGA
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Miss C Charlton of Bhogal & Co Solicitors
For the Respondent: Mr D Clarke, Senior Home Office Presenting Officer

1. *In an Upper Tribunal error of law decision that remits an appeal to the First-Tier Tribunal, a clear indication should be given if the appeal is to be re-made de novo. If that is not the case, the error of law decision should set out clearly the issues which require re-making and any preserved findings of particular relevance to the re-making of the appeal.*

2. *As set out in BW (witness statements by advocates) Afghanistan [2014] UKUT 00568 (IAC) at paragraph (v) of the headnote of that case: "(v) Where an advocate makes a witness statement in the circumstances outlined above, a change of advocate may be necessary, since the roles of advocate and witness are distinct, separated by a bright luminous line. An advocate must never assume the role of witness."*

3. *As stated in paragraph 44 of R (on the application of RK) v Secretary of State for the Home Department (Section 117B(6): "parental relationship") IJR [2016] UKUT 00031 (IAC), if a non-biological parent ("third party") caring for a child claims to be a step-parent, the existence of such a relationship will depend upon all the circumstances including whether or not there are others (usually the biologically parents) who have such a relationship with the child also. It is unlikely that a person will be able to establish they have taken on the role of a parent when the biological parents continue to be involved in the child's life as the child's parents*.

DECISION AND REASONS

1. This is an appeal against the decision issued on 24 November 2017 of First-tier Tribunal Judge G Jones QC which refused the Article 8 ECHR appeal of Mr Ortega.

Background

2. The appellant is a citizen of Ecuador and was born on 1 June 1979. He claims to have come to the UK in January 2001 using a false Spanish passport. Having entered illegally he remained unlawfully until he made an application for leave to remain on Article 8 ECHR grounds on 14 January 2015. The application was based on a relationship akin to marriage with Ms Jexi Falcones, a British national, and her British daughter, A, born on 14 October 2006.

3. On 16 March 2015 the appellant was convicted of possessing/controlling an identity document with intent. He was sentenced to a suspended imprisonment of six months and a requirement to undertake unpaid work for 120 hours.

4. On 5 May 2015 the respondent refused Mr Ortega's Article 8 ECHR application.

Respondent's Decision dated 5 May 2015

5. In the decision refusing the Article 8 ECHR claim, the respondent found that the Immigration Rules were not met. Firstly, the appellant did not meet the suitability requirements of Appendix FM, specifically paragraph S-LTR.1.6. as the appellant's conviction and illegal entry and residence amounted to conduct such that it was undesirable for him to be allowed to remain in the UK.

6. Secondly, as he fell for refusal under paragraph S-LTR.1.6., the appellant could not meet the relationship requirements of R-LTRP.1.1(c)(i) or (d) (i) of Appendix FM to the Immigration Rules. Further, the appellant indicated that he and Ms Falcones had begun to cohabit only in November 2014. They had therefore not been living together in a relationship akin to a marriage for two years prior to the application in January 2015 and could not meet paragraph GEN.1.2.(iv) of Appendix FM. Failure to meet those

requirements meant that the appellant was not entitled to the benefit of paragraph EX.1 of the Immigration Rules.

7. Thirdly, the appellant's relationship with A did not meet the requirements for leave as a parent. The appellant's inability to meet the suitability requirements prevented him from doing so. A was not his child so he could not meet paragraph E-LTRPT.2.2 of Appendix FM. In any event, he did not have sole responsibility for A and cohabited with her mother, precluding the requirements of paragraph E-LTRPT.2.3. from being met. He could not come within the definition of a parent set out in paragraph 6 of the Immigration Rules as, even if his claim to be A's stepfather was accepted, her biological father was still alive.

8. The respondent also found that paragraph 276ADE of the Immigration Rules was not met as the appellant did not have the requisite number of years of residence and could not show that the "very significant obstacles" to re-integration test from paragraph 276ADE(vi) was met given that he lived in Ecuador until the age of 22 and would have retained social, cultural and familial ties.

9. In the Article 8 ECHR assessment outside the Immigration Rules, as the appellant had only been living with Ms Falcones and A for six months, it was not found that he had developed such strong bonds with them that they would experience unjustifiably harsh consequences if he were to leave the UK. Ms Falcones could be expected to provide for A's welfare, with state support if necessary. Any difficulties for Ms Falcones and A were outweighed by the applicant's conduct in entering and remaining in the UK illegally and his criminal conviction.

First-tier Tribunal Decisions

10. The appellant's appeal to the First-tier Tribunal was initially dismissed in a decision issued on 10 October 2016 by First-tier Tribunal Judge Amin. In that decision First-tier Tribunal Judge Amin did not find the appellant's relationship with A was sufficiently strong to meet the provisions of the Immigration Rules or that the appellant's return to Ecuador would affect her best interests which were to be with her mother and retain contact with her natural father. It was accepted that the appellant had a relationship with Ms Falcones but not one that met the provisions of the Immigration Rules or showed that it would be disproportionate for the appellant to return to Ecuador where the relationship was formed at a time when the couple knew that Mr Ortega was in the UK illegally.

11. Permission to appeal to the Upper Tribunal against the decision of Judge Amin was granted in a decision dated 8 February 2017.

12. In a decision issued on 20 April 2017, the Upper Tribunal found an error of law and remitted the appeal to be re-made in the First-tier Tribunal. The Upper Tribunal decision identifies in paragraph 8 that an error of law arose as the First-tier Tribunal had proceeded on the mistaken basis of the appellant's conviction being for possession of controlled drugs and placed significant weight on that factor. In paragraph 9 the Upper Tribunal found a second error as the First-tier Tribunal referred to the appellant being

returned to Jamaica. A third material error of law was found in paragraph 10 where the First-tier Tribunal expressed doubts about the appellant having a genuine relationship with Ms Falcones but accepted elsewhere in the decision that he had established a family life in the UK with her and A, the two findings being contradictory.

13. The remitted appeal came before the First-tier Tribunal again on 14 November 2017, on this occasion before First-tier Tribunal Judge G Jones QC. In his decision issued on 24 November 2017 he found that the appellant had not shown that the Immigration Rules could be met and that it was proportionate for the appellant to return to Ecuador.

14. The appellant again applied for permission to appeal to the Upper Tribunal. Permission was granted in a decision dated 4 January 2018. Thus the hearing came before us on 26 June 2018.

Grounds of Appeal

15. The appellant brought four grounds of appeal against the decision of the First-tier Tribunal.

16. Ground 1 maintained that the decision of the First-tier Tribunal disclosed bias.

17. Ground 2 maintained that the First-tier Tribunal had not taken a lawful approach to the best interests assessment of A.

18. Ground 3 alleged procedural unfairness where the First-tier Tribunal had been asked to watch an interview of A discussing her relationship with the appellant which had been recorded onto a CD but the decision showed that he had only read a transcript of that interview. This ground also argued procedural error arose as the First-Tier Tribunal had relied on matters from the decision of First-tier Tribunal Judge Amin which had been set aside and not treated the appeal as *de novo*.

19. Ground 4 concerned a failure to give adequate reasons for placing little weight on the independent social work report.

20. Ground 5 maintained that the Article 8 ECHR proportionality assessment was infected by the errors of law contained in grounds 1 to 4 and also objected to a comparison of the separation from A as a result of the appellant's removal to Ecuador being similar to separation from a child arising from the imprisonment of a criminal offender.

21. The respondent provided a rule 24 letter dated 29 January 2008 maintaining that the allegation of bias was not made out and the grounds were really only a disagreement with an adverse but fully reasoned decision. The judge treated the appeal as *de novo*, made his own assessment of the evidence and did not adopt the findings of the previous judge. It was open to him take into account evidence recorded in the previous First-tier Tribunal decision. The approach to the best interests of the child was not, in substance, erroneous.

Discussion

Ground 1

22. The Upper Tribunal decision of Alubankudi (Appearance of bias) [2015] UKUT 00542 sets out in paragraphs 6 to 8 the "Governing Legal Principles" to be applied when considering an allegation of bias:

> 6. Every litigant enjoys a common law right to a fair hearing. This entails fairness of the procedural, rather than substantive, variety. Where a breach of this right is demonstrated, this will normally be considered a material error of law warranting the setting aside of the decision of the FtT: see AAN (Veil) Afghanistan [2014] UKUT 102 (IAC) and MM (Unfairness; E&R) Sudan [2014] UKUT 105 (IAC). The fair hearing principle may be viewed as the unification of the two common law maxims audi alteram partem and nemo judex in causa sua, which combine to form the doctrine of natural justice, as it was formerly known. These two maxims are, nowadays, frequently expressed in the terms of a right and a prohibition, namely the litigant's right to a fair hearing and the prohibition which precludes a Judge from adjudicating in a case in which he has an interest.
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> 7. Further refinements of the fair hearing principle have resulted in the development of the concepts of apparent bias and actual bias. The latter equates with the prohibition identified immediately above. In contrast, apparent bias, where invoked, gives rise to a somewhat more sophisticated and subtle challenge. It entails the application of the following test:
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> > 'The question is whether the fair-minded observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased.'
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> See Porter v Magill [2001] UKHL 67, at [103].
>
> In Re Medicament [2001] 1 WLR 700, the Court of Appeal provided the following exposition of the task of the appellate, or review, court or tribunal:
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> > 'The Court must first ascertain all the circumstances which have a bearing on the suggestions that the Judge was biased. It must then ask whether those circumstances would lead a fair minded and informed observer to conclude that there was a real possibility that the Tribunal was bias. The material circumstances will include any explanation given by the Judge under review as to his knowledge or appreciation of those circumstances.'
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> In Lawal v Northern Spirit [2003] UKHL 35, the House of Lords reiterated the importance of first identifying the circumstances which are said to give rise to apparent bias."
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> 8. The authorities place due emphasis on the requirement that the hypothetical reasonable observer is duly informed. This connotes that the observer is in possession of all material facts. See, for example, Taylor v Lawrence [2002] EWCA Civ 90, at [61] – [63]. Furthermore, the hypothetical fair minded observer is a person of balance and temperance, "*… neither complacent nor unduly sensitive or*

> *suspicious*", per Lord Steyn in Lawal at [14]. Finally, it is appropriate to emphasise that the doctrine of apparent bias has its roots in a principle of some longevity and indisputable pedigree, namely the requirement that justice not only be done but manifestly be seen to be done: see, for example, Davidson v Scottish Ministers [2004] UKHL 34. "

23. Our task is therefore to place ourselves in the position of a "duly informed" hypothetical reasonable observer in order to assess whether the First-tier Tribunal decision discloses an absence of judicial impartiality or real possibility of such. To assist in that task, in addition to the decision and grounds of appeal, we were provided with the view on the allegation of bias of Judge Jones QC, incorporated into a Memorandum dated 21 February 2018. The burden of proof in the allegation rests on the appellant to the standard of the balance of probabilities.

24. Ground 1 maintained, firstly, that it was obvious, even in the preliminary parts of the decision, that the judge had formed an adverse opinion which "set the tone for the rest of the determination". We were referred to the paragraph 6 of the decision which was a summary of the Upper Tribunal error of law decision. Detailed reference to the error of law decision was considered necessary as a preliminary issue as it was not found that it was sufficiently clear as to the extent of the re-making that was required.

25. Judge Jones QC stated as part of the summary of the Upper Tribunal's reasoning:

> "... it is difficult to understand why a conviction for an offence which involves dishonesty should impact less when credibility and/or proportionality are being considered than a conviction for possessing a controlled drug."

26. We did not find that this statement was capable of showing bias or a material inclination against the appellant. The judge's comment that, in his view, a drugs offence does not necessarily weigh more heavily than an offence of dishonesty does not form part of his assessment of the appellant's offence. It is merely an unnecessary critique of the reasoning of the Upper Tribunal in the error of law decision. It is immaterial to the judge's assessment later in the decision of the correct offence committed by the appellant. The grounds allege bias but do not particularise how this comparison of the two offences shows impartiality. The grounds also, quite properly, do not seek to argue that the First-tier Tribunal was not entitled to place significant weight on the applicant's offence of using a false passport to facilitate illegal entry and a long period of illegal residence. The comment in paragraph 6 may be otiose but it does not disclose bias.

27. We are mindful that this part of the challenge to the decision of the First-Tier Tribunal arose from a perceived lack of clarity in the error of law decision of the Upper Tribunal on the extent of the error and exactly what it was that required re-making. In an Upper Tribunal error of law decision that remits an appeal to the First-Tier Tribunal, a clear indication should be given if the appeal is to be re-made de novo. If that is not the case, the error of law decision should set out clearly the issues which require re-making and any preserved findings of particular relevance to the re-making of the appeal.

28. Ground 1 goes on to criticise the description of the appellant in paragraph 45 of the decision as displaying "criminal tendencies and lack of moral fibre". The comment was made as part of the assessment of A's best interests, the view of the First-tier Tribunal being that they were not well-served by being exposed to someone with the appellant's profile. The grounds maintain that this wording was a "very personal attack" and "indicative of the overt bias" of the First-tier Tribunal.

29. Judge Jones QC comments on this submission in the third paragraph of the Memorandum, stating:

> "I do not understand the complaint that my entirely apposite observations about the appellant, contained in paragraph 45 of my Determination, are capable of demonstrating bias. They are, and were intended to be, robust condemnatory observations and commentary upon the appellant. The facts entirely justified those observations. If it is "bias" for a judge to make robust but accurate adverse observations about an appellant, then so be it. If that is the case then it seems that many a judge sitting in the Crown Court will be guilty of bias when making sentencing remarks which point out a defendant's adverse character and criminal predilections.
>
> My comments were nothing like those in **Alubankudi**, given that they were not of a general nature, but were specifically tailored to and critical of this individual appellant, based upon evidence that led inexorably to my conclusions about him."

30. Albeit it might be preferable for criticism of the appellant to be expressed in more temperate language, in our judgment the First-tier Tribunal was entitled to find the appellant's profile to be highly negative and for this to be a legitimate factor in the best interests assessment. It is not disputed that it was open to the First-tier Tribunal to form an adverse view of the appellant as a result of his offending and immigration history. That the judge did so and expressed this finding in "robust" language is not something capable of showing bias.

31. Ground 1 also maintained that bias was shown in the finding of the First-tier Tribunal in paragraph 39(x) that Ms Falcones had used deception when obtaining her British citizenship. Judge Jones QC said this at paragraph 39(x):

> "I find that Jexi Falcones used deception to obtain her British citizenship in that she maintained the pretence that she was then in a genuine and subsisting (*de facto*) marriage with her erstwhile husband, notwithstanding that, as she belatedly said before me in evidence, she had not lived with him in this country for more than three months after her return from Ecuador. If the respondent had been aware that the marital relationship had broken down so that Jexi and her erstwhile husband were then only married *de jure* and not *de facto*, it is unlikely that her application would have succeeded. I have little doubt that that was understood by Jexi; hence her willingness to keep the truth from the authorities."

32. The grounds of appeal maintain that there was "absolutely no evidence" to allow such a conclusion to be reached and that the reasoning on the issue was therefore "unclear".

33. We did not find that this submission had merit. Firstly, the manner in which the ground was put did not appear to us to set out a bias challenge but was an argument that the finding on the use of deception was irrational, being unsupported by evidence or that procedural unfairness arose as the point was not put to the appellant and Ms Falcones at the hearing.

34. Secondly, it not correct that there was no evidence capable of supporting the finding of the First-tier Tribunal judge on Ms Falcones' use of deception. On page 2 of 9 of the refusal letter dated 5 May 2015 the respondent set out inconsistencies in the couple's evidence about their history. The application maintained that they had been in a relationship since 2011. At the same time, Ms Falcones submitted an application for indefinite leave to remain as the spouse of a British citizen in November 2011 which was granted in March 2012. She made a naturalisation application in April 2013 and submitted her British spouse's passport in support of that application.

35. Further, as recorded in paragraph 27 of the decision, Ms Falcones was cross-examined at the hearing about how she obtained settlement in 2012 and naturalisation in 2013 on the basis of marriage to a British national but now maintained that she had been in a relationship with the appellant since 2011. Her evidence initially was that she had only lived with her British husband in Ecuador, prior to coming to the UK in 2009. She then gave a different account of having lived with her British husband for 3 months after coming to the UK.

36. The conclusion drawn from this evidence by Judge Jones QC in paragraph 39(x) was a legitimate one. It was open to him to find that the oral evidence showed material reliance on a relationship with a British national at the same time that Ms Falcones and the appellant claimed to be in a relationship. There is no suggestion that any objection was made to the cross-examination on this aspect of Ms Falcones history. The potential implications of the evidence given by the appellant and Ms Falcones were sufficiently obvious for their legal representative to be expected to deal with them either in re-examination or in submissions. A judge is not required to put every potential adverse credibility finding to an applicant or other witnesses in order for them to have the opportunity for it to be addressed, particularly where the point is relatively obvious, as here. Again, albeit expressed in robust terms, the First-tier Tribunal was entitled to draw an adverse inference on Ms Falcones' character and the reliability of her evidence and the grounds do not show that bias played any part in that assessment. We also did not find that the reasoning was irrational or disclosed procedural error.

37. For these reasons we did not find that the allegations of bias in Ground 1 were made out. Putting ourselves in the position of the hypothetical observer, duly informed, the decision does not show improper impartiality but conclusions which, albeit strongly expressed, were legitimately open to the judge on the material before him.

Ground 2

38. Section 55 of the Borders, Citizenship and Immigration Act 2009 provides:

> "(1) The Secretary of State must make arrangements for ensuring that
>
> (a) the functions mentioned in subsection (2) are discharged having regard to the need to safeguard and promote the welfare of children who are in the United Kingdom."

This duty to have regard to the welfare of children when making immigration decisions is commonly referred to as a requirement for a "best interests assessment" to be conducted and is an entirely standard feature in Article 8 ECHR claims involving children.

39. Ground 2 objects to the comments of the First-tier Tribunal in paragraph 36 of the decision on the correct legal approach to the assessment of A's best interests.

40. Judge Jones QC says this at paragraph 36:

> "Two problems arise. The first is whether or not an application under Article 8 ECHR is a function of the Secretary of State 'in relation to immigration, asylum or nationality'. Strictly speaking, it seems to me that it is not such a decision and so Section 55 of the 2009 Act has no application in the instant case. However, I have little doubt that that might be seen as a heresy because the interest of children must always be taken into account in this kind of situation. Thus, although I think it does not strictly apply, I will proceed as if Section 55 of the 2009 Act is in play. The second difficulty is that that statutory provision does not require the 'best interests' of children to be a first consideration. It quite specifically requires that when any function of the Secretary of State of State in relation to immigration, asylum or nationality is being discharged the Secretary of State of State must discharge that function 'having regard to the need to safeguard and promote the welfare of children who are in the United Kingdom.' That is rather different and is not quite such a high threshold as giving the best interests of a child or children primary consideration. I prefer to follow the statutory words rather than the inaccurate gloss which appears to have been placed upon it by some courts."

41. We accept that it is not correct for a First-tier Tribunal Judge to prefer a different interpretation of the statute to that set down by the superior courts, for example, the Supreme Court in ZH (Tanzania) v SSHD [2011] UKSC 4 and Zoumbas v SSHD [2013] UKSC 74, both providing that the best interests of a child rank as a primary consideration in decisions concerning the child.

42. However, notwithstanding the judge's objection in paragraph 36 to the guidance of the superior courts on the primacy of a child's best interests, he went on to conduct a substantive assessment of A's best interests in paragraph 44:

> "44. I am acutely aware that it might be said that the Section 55 (sic) should be my starting point and not something to be afforded subsequent consideration. I have had that in mind and it is no more than convenience that I specifically refer to it at this stage in my Determination. I do not accept that, even if Section 55 of the 2009 Act

> is applicable, it could possibly be said that A's welfare would not be safeguarded. She will either continue to reside with her mother in this country or she will reside with her mother and stepfather in Ecuador. That will not involve any want of safeguarding or her welfare. I appreciated that it might be said, as it was by Miss Charlton, that her welfare will not be promoted if the appellant is required to depart the United Kingdom. I accept that her welfare is nurtured by her living in a household with her mother and stepfather, but only to a modest extent, given my finding (above) that there has been a significant degree of exaggeration in the evidence given by the appellant and his wife, with a view to bolstering the prospect of the appellant achieving the result he desires from this appeal."

43. The judge also commented in paragraph 45 that A's best interests were not well-served by exposure to someone of the appellant's poor character, those comments being discussed above at [28] to [30].

44. The decision therefore shows that the First-Tier Tribunal conducted a best interests assessment. The conclusion was that the appellant's removal was not a significant factor capable of undermining A's best interests which were to continue to be cared for by her mother in the UK. An assessment of A's best interests did form part of the Article 8 balancing exercise, therefore. If there was a failure to take them as a primary consideration, as is indicated by the judge's comments at paragraph 36, that was an error. It was not a material error, however, as, weighing A's best interests as a primary factor could not assist the appellant since those interests did not lie in his remaining in the UK.

Ground 3

45. Ground 3 comprises two limbs. The first concerns a dispute as to whether the First-tier Tribunal Judge agreed that after the hearing and prior to making the decision he would watch a CD of an interview with A discussing her relationship with the appellant. The material before us shows a clear disagreement as to what was said on this matter at the hearing. The judge sets out at paragraph 32:

> "I was also invited to read, and have read, a transcript of answers given by A to prepared questions. They appear in the Supplemental Bundle at pages 6-9. I also had a CD of her being interviewed but it was agreed by all concerned that the transcript was a faithful reproduction of the questions and answers recorded on the CD and that, in those circumstances, I need not view it. Accordingly I have not done so."

46. Judge Jones QC is equally clear on the second page of the Memorandum under the heading "Ground 3" that the agreement at the end of the hearing was not that he should view the CD but that he should read the transcript, that he did so and made a note to that effect. We consulted the record of proceedings which shows that note on page 6, "Transcript SB 6-9 READ A's Ev (sic)".

47. We also noted that the Tribunal file contains an application from the legal representatives prior to the hearing before the First-tier Tribunal requesting that video facilities be made available in order for the CD to be

viewed. We accept that this provides some support to the grounds arguing that the CD was considered to be an important piece of evidence which the judge should see.

48. There is no record of proceedings or witness statement from the legal representative for the appellant before the First-tier Tribunal hearing. Accordingly, in light of the clear comments by the First-tier Tribunal judge and his note in the record of proceedings, there is insufficient evidence to support the argument that the First-tier Tribunal agreed to view the video and did not do so. The submission that a procedural error arose as a result cannot have merit, therefore.

49. The material part played in this decision by the absence of a witness statement from the appellant's legal representative before the First-tier Tribunal shows the continuing relevance of the guidance on the importance of giving consideration to the provision of such a statement when bias or procedural error is alleged as set out in BW (witness statements by advocates) Afghanistan [2014] UKUT 00568 (IAC) and the indication at paragraph (v) of the headnote of that case that:

> "(v) Where an advocate makes a witness statement in the circumstances outlined above, a change of advocate may be necessary, since the roles of advocate and witness are distinct, separated by a bright luminous line. An advocate must never assume the role of witness."

50. The second limb of Ground 3 concerns references by Judge Jones QC to the determination of First-tier Tribunal Judge Amin which was set aside to be re-made. It is undisputed that the judge clarified at the outset of the hearing that the appeal before him was *de novo*; see paragraphs 12 and 13. It is argued for the appellant that this prohibited the First-tier Tribunal from referring to that decision and to the evidence given at the original hearing. The appellant objects in particular to the references to the previous decision in paragraphs 5, 6, 17, and paragraphs 39 (viii), (ix) and (xiii).

51. On examination, it did not appear to us that any of these references to the decision the first hearing before the First-tier Tribunal could be said to show that the hearing before Judge Jones QC and the decision were not made *de novo* or that improper reference was made to the earlier decision. As above, a clear indication was given that the appeal was to be decided *de novo*. Nowhere do the grounds identify a finding from the earlier decision that was followed or adopted by the judge here.

52. The reference at paragraph 5 to the "Devaseelan principles" was merely a record of the submission of the appellant's representative that those principles did not apply here. The reference in paragraph 6 only identifies the error in the earlier decision concerning the appellant's conviction. In paragraph 17 the judge refers to the earlier appeal as a "failed appeal". That is simply statement of fact on which nothing turns. The same is so regarding the reference in paragraph 39(xiii) to the marriage of the

appellant and Ms Falcones taking place six weeks after the decision of Judge Amin.

53. In paragraph 39(viii) and (ix) Judge Jones QC says this:

> "(viii) At paragraph 10 of the Determination of Immigration Judge Amin, she records that Jexi gave evidence before her that A (at that time) saw her father (who lived in London) every two weeks, albeit that she had no great inclination to do so. That was not divulged before me, nor, in fairness, was it put to any of the witnesses. Nonetheless, I take the view that it is wholly improbable that Jexi would have lied to Immigration Judge Amin on that issue when she gave evidence in September 2016. It follows that I reject the evidence given by the appellant when, in cross-examination, he asserted that A had last seen her father in 2013. When he made that assertion, although he was not referred to paragraph 10 in the Determination, he was referred to the paragraph at page 4 of the respondent's Refusal Letter dated 05 May 2015 where it is asserted that he had reported that A continued to have some contact with her natural father. The appellant made no response when that was put to him. I am entirely satisfied that the lack of response was because, once more, the appellant had been lying when he said that A had had no contact with her natural father since 2013.
>
> (ix) Jexi Falcones' evidence was that A had last seen her father '*two years ago'* which would put that last contact some time in 2015, well prior to when she gave evidence before Immigration Judge Amin. I again refer to paragraph 10 of that Determination. I am satisfied that Mrs Falcones did not give truthful evidence before me on that issue."

54. The appellant's relationship with A is the high point of his case. The role played by A's biological father was an important part of the assessment of whether the appellant could be said to have a substantive relationship with her.

55. As stated in paragraph 44 of R (on the application of RK) v Secretary of State for the Home Department (Section 117B(6): "parental relationship") IJR [2016] UKUT 00031 (IAC), if a non-biological parent ("third party") caring for a child claims to be a step-parent, the existence of such a relationship will depend upon all the circumstances including whether or not there are others (usually the biologically parents) who have such a relationship with the child also. It is unlikely that a person will be able to establish they have taken on the role of a parent when the biological parents continue to be involved in the child's life as the child's parents.

56. The grounds do not suggest that the record of the evidence from Judge Amin's decision concerning contact with A's biological father relied upon in the decision of Judge Jones QC was in any way inaccurate. The judge was therefore entitled to take into account all of the evidence that was before him on that issue including that given before Judge Amin as long as he made an independent decision on that evidence. That independent reasoning is manifestly present here in paragraphs 39 (viii) and (ix).

57. It was therefore our conclusion that Ground 3 had no merit.

Ground 4

58. Ground 4 maintains that First-tier Tribunal Judge Jones QC failed to give adequate reasons for rejecting the evidence of the independent social worker, Hannah Prince. Judge Jones QC comments on this at paragraph 34:

> "Reference was made to a privately commissioned report from Hannah Prince which appears at Section C in the Appellant's Bundle. It is dated 12 January 2015. It has to be read with caution because, just like a report prepared by a psychiatrist, it is highly dependent upon what has been said or reported to the social worker. It is apparent from reading her report that she simply accepted at face value everything that was asserted to her. I have been unable to ascertain to what extent, if any, she approached such assertions with an enquiring mind. She states her conclusion is being that it is her opinion that "*it is in the best interests of Mr Ortega, Ms Falcones and A that Mr Ortega remains in the United Kingdom to allow him to continue with his caring role he has for A, maintain the family links and social connections he has made with the local community as well as the life the family had made for themselves here in the United Kingdom."* I have little doubt that the phrase "best interests" was deliberately chosen based on the misunderstanding that it is the requirement in Section 55 of the 2009 Act. That statutory revision is often mischaracterised as requiring the 'best interests' of children to be taken into account when an immigration decision is taken."

59. Judge Jones QC goes on in paragraph 39(xi) to state as follows:

> "So far as the reports from the social workers are concerned, and, more particularly, that prepared by Hannah Prince, I am entirely satisfied that it is based on self-serving evidence and assertions made to her by the appellant and Jexi. It is not, in any true sense, an expression of expert opinion formed after considering objectively ascertained facts. It is rather like a report from a psychiatrist which will often be substantially dependent upon the truthfulness and/or accuracy of information provided by the subject of the report although it's close to him/her."

60. This assessment of the independent social worker report of Ms Prince was made in the context of the evidence as a whole. Judge Jones QC found that the appellant and Ms Falcones had given significantly inconsistent and unreliable evidence on the history of their own relationship, on Ms Falcones' relationship with her first husband, on the appellant's relationship with A and her contact with her biological father. The appellant's reliability as a witness was also found to be undermined by his history of illegal entry and residence in the UK and reliance on a false passport.

61. We find that the judge was entitled to assess the social work reports and the evidence given to Ms Prince in the context of those other, adverse aspects of the evidence and to find that Ms Prince's report, albeit prepared in good faith by a professional witness, did not attract weight. Nothing indicates that Ms Prince was aware of the discrepant history of the relationship between the appellant and Ms Falcones, Ms Falcones' immigration history or the inconsistent evidence on A's contact with her biological father. Other than a reference to "the absence of her biological

father" on page 9, Ms Prince's report is silent on the question of A's relationship with her biological father, an important factor when assessing her relationship with the appellant; see again R (on the application of RK).

62. We therefore found that the First-tier Tribunal gave adequate and rational reasons for placing little weight on the social work evidence.

Ground 5

63. Ground 5 maintains that the Article 8 ECHR proportionality assessment:

> "… is wholly inadequate and the reference in paragraph 44 to the significant degree of exaggeration" is a direct reflection of Judge Jones' findings regarding credibility. It is submitted that going behind his own decision to hear the appeal *de novo* has contaminated all of the findings of the Judge therefore rendering it impossible to undertake a lawful and sustainable proportionality exercise."

We have set out above why we do not find that Grounds 1 to 4 show that the First-tier Tribunal showed bias, took an incorrect approach to evidence given before Judge Amin or erred in finding the appellant and his partner to be unreliable witnesses. We do not find the reference to "significant exaggeration" in paragraph 44 takes any of those grounds any further.

64. Ground 5 also objects to the comparison in paragraph 45 of the appellant's separation from A on his removal to Ecuador to the separation of a child from a parent serving a prison sentence. The grounds argue that the analogy was incorrect and acted to "blur an already extremely confused proportionality assessment.

65. It is not our judgement that the comparison drawn was inaccurate or confusing. Judge Jones QC goes on to explain the purpose of the comparison. stating:

> "I mention that only to bring home the point that this very much again involves a balancing exercise."

That is unobjectionable. He was indeed required to conduct a balancing exercise between the public interest in removal and the Article 8 rights of the appellant, Ms Falcones and A. This is a very well-understood principle in an Article 8 proportionality assessment so the comparison does not appear to have been necessary but it did not, in our view, demonstrate an incorrect approach or lack of clarity that could amount to an error of law.

66. We therefore did not find that Ground 5 had merit.

Conclusion

67. It is therefore our conclusion that the grounds challenging the decision of First-tier Tribunal do not show a material error of law.

Notice of Decision

68. The decision of the First-tier Tribunal does not disclose a material error on a point of law and shall stand.

Signed:  Date: 30 July 2018
Upper Tribunal Judge Pitt