Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/19234/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 9 August 2019	**On 3 September 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE APPLEYARD

Between

MR A B L
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Miss Grace Brown, Counsel – Direct Access.
For the Respondent: Miss A Fijiwala, Home Office presenting Officer.

DECISION AND REASONS

1. The Appellant is a citizen of Pakistan who appealed the refusal of his human rights claim on family and private life grounds for further leave to remain in the United Kingdom. His appeal was heard by Judge of the First-tier Tribunal Plumptre who, in a decision promulgated on 26 April 2019, dismissed it.

2. The Appellant sought permission to appeal which was initially refused but a renewed application was successful on 4 July 2019. Deputy Upper Tribunal Judge Manuell gave the following reasons for granting permission to appeal: -

> *"The renewed grounds dated 26 June 2019 (to which reference should be made) address the timeliness issue identified by First-tier Tribunal Ford, who refused to extend time but went on to identify two arguable errors of law, then formally refused permission to appeal rather than declining to admit the application. The Appellant has now produced compelling evidence that the permission to appeal application was in fact submitted in time to the First-tier Tribunal but was subject to postal delay. The tribunal is satisfied that Bhavsar [2019] UKUT 00196 (IAC) applies so that it has jurisdiction. The permission to appeal application to the First-tier Tribunal was in time.*
>
> *If that for any reason were a mistaken view, the tribunal is satisfied that the interests of justice would require the admission of the out of time application where even on an adverse view any delay was marginal and where arguable material errors of law had been identified.*
>
> *As to the arguable errors of law, given the new finding now made on timeliness, it is plain that the Appellant has in effect already secured permission to appeal and it will now be for the Upper Tribunal to determine whether the two arguable grounds identified by Judge Ford are material. The other grounds for which Judge Ford refused permission but for which a renewed application is made are in substance quarrels with findings of fact open to the judge and are in any event largely subsumed within the arguable material errors of law identified by Judge Ford. Permission to appeal on those grounds is refused. Permission to appeal is granted only for the arguable material errors of law identified by Judge Ford on 7 June 2019."*

3. Thus, the appeal came before me today.

4. With reference to Judge Manuell's above mentioned grant of permission to appeal, he refers to the two grounds identified initially by Judge Ford, which disclose arguable errors of law. For completeness, the two grounds found to be arguable by Judge Ford are:-

> *"a. Failure to assess the issue of reasonableness as at the date of hearing and deciding that "it would be reasonable for the three minor children to leave the UK with one or other of their estranged parents, but in reality, with their mother, should her asylum claim fail". It is arguable that this involved the Tribunal in assessing the reasonableness issues on facts other than the facts as at the date of hearing. It is arguable that if the Tribunal considered the mother's asylum claim relevant to the issue of reasonableness, the case should have been adjourned to await the outcome of her claim.*
>
> *c. Concluding that progression to staying contact was unlikely and that there was no subsisting relationship between the Appellant and the qualifying children, given the evidence that*

> *contact had progressed from supervised to supported contact sessions."*

5. Miss Brown referred me to paragraph 22 of the First-tier Tribunal Judge's decision where she states:

> *"... hence, I find it reasonable for all three sons to leave the UK with one or other of their estranged parents (both of Pakistani origin), but in reality with their mother, should her asylum claim fail".*

6. She submitted that the Judge erred in concluding that it was reasonable for the children to leave the United Kingdom, in particular the qualifying children, in the event that their mother's asylum claim was unsuccessful. The assessment of whether or not it is reasonable for a child or children to leave the United Kingdom must be made as at the date of hearing and not be based on speculation as to what may or may not happen in the future. Thus, Miss Brown submitted that the Judge's conclusion was both unsustainable and erroneous in law. The submission that the date of hearing is the relevant date was expressly made at the hearing both orally, and in the skeleton argument and the Judge has failed to address this issue. Moreover, both of the "qualifying children" are subject to the United Kingdom Court Order providing for them to reside with their mother and there is no possibility or prospect of those children leaving the United Kingdom with their father. Accordingly, the Judge's conclusion that the children could leave with their father is also legally erroneous. Further, that the Judge misdirected herself in stating that two of the children had arrived in the United Kingdom on 16 December 2010. One had arrived in the United Kingdom on 31 October 2010 and the other was born in the United Kingdom. The Judge also misdirected herself in respect of the period during which there had been no contact between the boys and the Appellant. It was stated at paragraph 27 of her decision that this was for a period of two years and nine months and later there is reference to "nearly three years". This though, fails in assessing contact to take into account the evidence that indirect contact had been ordered on 13 July 2017 and there had been two sessions of supervised contact prior to it commencing formally in March of 2018. Miss Brown submitted that these factual errors demonstrated a "less than careful best interests assessment as is required by law".

7. The second arguable ground relates to the First-tier Tribunal Judge's conclusion that progression to staying contact in unlikely. At paragraph 39 of her decision, the Judge concludes that the Appellant has attended supervised and thereafter supported contact sessions of two hours per fortnight for just over one year since supervised contact began in March of 2018 and that this has not progressed to staying contact as was hoped by the Court Order. She went on to state "again, the reality is that this would now be unlikely given that the Appellant has chosen to establish a new family unit with Ms M and any relationship with his three sons, tentatively re-established after a gap of nearly three years, is clearly too fragile for

these children to be introduced to a step mother and a half sibling". Ms Brown submitted that the Judge's conclusion is "grossly inconsistent" with the evidence which indicated that by the end of the supervised contact sessions, contact had progressed sufficiently well to progress to supported contact. This was quite simply a conclusion that was not open to be made on the totality of the evidence. Further, the Judge erred in failing to come to a finding on whether there was a subsisting relationship between the Appellant and these two qualifying children.

8. Miss Fijiwala relied upon the Respondent's Rule 24 response dated 16 July 2019. There it is stated that the Judge had directed herself "appropriately". That the suggestion that the test of reasonableness in respect of the qualifying children was considered at any other date than that of the hearing is "misconceived" and that any speculation as to whether or not the Appellant's children's mother would, or would not, be successful in her asylum claim, would not have assisted the Judge at the date of hearing. In the context of both parents being removable from the United Kingdom, the Judge needed to consider whether it was "reasonable" for the children to accompany either of them. She gave consideration to that and there is no materiality to the Judge's conclusion that progression to staying contact was unlikely.

9. Miss Fijiwala confirmed that the Appellant's ex-wife had, in fact, become appeal rights exhausted on 29 September 2016 and accordingly, has had no status since then. It was unfortunate that the Respondent was unrepresented at the First-tier Tribunal hearing and that this information was not conveyed to the Tribunal. Even if the Judge had erred, it was not material. Beyond that, the Judge had considered the issue of reasonableness at the date of hearing and given appropriate self-directions in relation to the authority of **KO (Nigeria) & Others v. SSHD [2018] UKSC53**. The Judge had "properly assessed" the circumstances of the children and parents before concluding that they could return to their country of origin with either parent. The Judge had gone on to consider all factors pertinent to the relationship between the Appellant and his qualifying children and the issue of the subsistence of that relationship.

10. I find that the Judge has materially erred for the reasons for which permission to appeal was granted. There is a failure to assess the issue of reasonableness as at the date of hearing. In noting that it would be reasonable for the three minor children to leave the United Kingdom with one or other of their estranged parents, but in reality with their mother, should her asylum claim fail, the Judge plainly considered that the mother's asylum claim was relevant to the issue of reasonableness and in the circumstances, consideration should have been given to the issue of an adjournment. I appreciate that no application was made and also that post the decision, and at the hearing in the Upper Tribunal, it has been confirmed that the Appellant's ex-wife is in fact, and was at the date of the hearing in the First-tier Tribunal, appeal rights exhausted. Whilst I appreciate the argument that the now disclosed facts in relation to the Appellant's ex-wife's asylum appeal may render the error immaterial, I do

not find that to be the position when considering the totality of error within the Judge's decision.

11. At the date of hearing, the First-tier Tribunal erred in concluding that it was reasonable for the qualifying children to leave the United Kingdom in the event of their mother's asylum claim being unsuccessful. The assessment of such reasonableness must be made at the date of hearing and not on a speculative outcome as to what may be the position at a future date. Further, as asserted by Miss Brown, the Judge has misdirected herself in relation to the factual matrix surrounding the issue of contact between the Appellant and his qualifying sons. It was not open to conclude that the Appellant's ex-wife's status in the United Kingdom was precarious if the outcome of her protection claim was unknown. The Judge's reasoning in relation to the progression and increasing contact between the Appellant and his two qualifying sons is inconsistent with the evidence that was before her. The conclusion that the progression to staying contact was unlikely and there was no subsisting relationship between the Appellant and the qualifying children, given the evidence that contact had been progressing from supervised to supported contact, is unsustainable.

Notice of Decision

The making of the decision of the First-tier Tribunal involved the making of an error on a point of law. The decision is set aside. The appeal is remitted to the First-tier Tribunal to be dealt with afresh pursuant to Section 12(2)(b)(i) of the Tribunals, Courts and Enforcement Act 2007 and Practice Direction 7(b) before any Judge aside from Judge Plumptre.

Anonymity direction is made.

Signed Date 22 August 2019

Deputy Upper Tribunal Judge Appleyard