Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/25070/2016**

THE IMMIGRATION ACTS

Heard at Field House, London	**Decision & Reasons Promulgated**
On 2nd March 2018	**On 14th March 2018**

Before:

DEPUTY UPPER TRIBUNAL JUDGE MCGINTY

Between:

MR S.A.

(ANONYMITY DIRECTION MADE)

Claimant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant in the Upper Tribunal

Representation:

For the Claimant: Mr Georget (Counsel)

For the Secretary of State: Miss Everett (Senior Home Office Presenting Officer)

DECISION AND REASONS

1. This is the Secretary of State's appeal against the decision of First-tier Tribunal Judge Colyer promulgated on the 5th June 2017, in which she allowed the Claimant's appeal seeking Leave to Remain on the basis of his family and private life in the UK. As it is the

Secretary of State's appeal I will refer to the Secretary of State as the "Secretary of State" and to Mr S.A. as the "Claimant", for the purposes of clarity.

2. Within the Grounds of Appeal it is argued that the Judge materially misdirected herself when considering the evidence submitted by Cheshire Constabulary in the case and that although the witness who attended from Cheshire Constabulary did not have first-hand knowledge of the Claimant's alleged conduct, it is argued they had access to the Cheshire Constabulary records of the Claimant's offending behaviour, which was argued to be reliable evidence which could be relied upon by the Tribunal. It is argued that following the case of Farquharson (removal – proof of conduct) [2013] UKUT 00146 (IAC), that although a criminal charge has not resulted in a conviction and is not a criminal record, the acts alleged to the charge may be established as conduct and that if the Secretary of State seeks to establish the conduct by reference to the context of police CRIS reports, the relevant document should be produced, rather than a bare witness statement referring to them.

3. In this case it is said that the Cheshire Constabulary's evidence was provided to the Claimant's representative in good time and they had ample opportunity of engaging and rebutting the evidence, but had failed to do so. It is argued the Judge had failed to explain why that evidence provided by Cheshire Constabulary was insufficient and why detailed allegations or concerns about the Claimant exploiting vulnerable young females was not sufficient in that regard. It was said the Claimant had received warnings regarding his conduct of harassing a young female and had breached orders preventing contact with a young female who was the subject of a Care Order and that there had been allegations of violence against a young female who he is ordered by the Court not to have contact with and yet he breached that and that charges were ultimately not pursued, as the victim who the Claimant had continued to have contact with him, despite the Court Order and decided to withdraw her support.

4. It is further argued that the evidence had also shown the Claimant had been found in possession of drugs and had admitted to a long drug habit at the hearing and although he claimed to have ceased taking drugs there was no evidence of that. It is argued that

the presence of the Claimant in the UK is not conducive to the public good and the Judge had failed to properly engage with the evidence provided.

5. In ground 2 it is argued that the Judge erred in finding that the Claimant was taking an active role in his child's upbringing and that the Claimant had provided extremely limited evidence which did not support the Tribunal's findings and that there was no evidence to support the ex-partner's evidence that the child stayed with the Claimant 3 to 4 days per week and that there should have been documentary evidence from independent sources as to his involvement. It is argued that the Tribunal failed to take account of the fact that the Claimant had been using 2 addresses and his ex-partner could not even confirm the Claimant's address, which was said to undermine his credibility in that regard. It was further argued that there was no independent evidence of the Claimant providing £30 per week to his ex-partner for child maintenance as well as buying clothes and toys.

6. Permission to appeal in this case had been granted by First-tier Tribunal Judge Grant on the 11th December 2017 who found that it was arguable that the Judge failed to engage with the evidence provided, when making findings in accordance with Paragraph S-LTR1.6 and further it was argued that the Judge erred in finding that the Claimant was taking an active role in his child's upbringing when there was no independent evidence to corroborate the claims and his ex-partner did not know the address which he was living at which was said to undermine the credibility of the claim that the child stayed with him there 3 to 4 times per week and in light of the lack of evidence regarding the support his ex-partner was given financially.

7. I also heard and have taken account of the oral submissions by both Miss Everett and Mr Georget.

My findings on error of law and materiality

8. In respect of the first ground of appeal, although it is argued that the Judge failed to properly take account of the offending behaviour revealed within Cheshire Constabulary records, the findings by First-tier Tribunal Judge Colyer were that PC

Middlebrook had no previous dealings with the Claimant personally and only came to the case on the Home Office/police liaison team Operation Nexus (Galleon) to search the computer and produce relevant extracts of the material downloaded.

9. The Judge noted at [40] that she had carefully considered the reports and attachments and the information outlined in the reports was probably accurate as to the data it purported to contain, regarding details of the complaint, arrest, response, actions taken and conclusions, but went on to find that that did not mean that what a witness was recorded as saying was necessarily accurate or true and that the Secretary of State had not supplied any of the statements of the witnesses to the alleged incidents and had not called any of those witnesses, complainants or other parties to the incidents, nor had the Secretary of State supplied any exhibits or other evidence in order to substantiate what were effectively mere allegations contained within the police logs and which she considered to be an insufficient basis on which to make significant findings of fact, even to the lower standard of proof on the balance of probabilities, rather than to the criminal standard, to find that the Claimant had been guilty of the conduct alleged. Indeed, the Judge noted that the Tribunal in Farquharson had stated specifically that:

"*Materials are like to be considered the more cogent, the greater the extent to which it is supported by other relevant documents. In the present case we have searched for data relating to the incidents independent of the Complainant's narrative. The CRIS extracts might have been supported by witness statements made by forensic medical examiners or eyewitnesses. This will not always be necessary, and the Tribunal is not conducting a retrial, but it may well prove helpful. We anticipate that the CPS should be able to assist the UKBA and indeed the Tribunal and where material is sensitive, appropriate direction as to its return and use can be made if requested in advance*".

The Judge on the evidence before her was entitled to find that the Secretary of State had not proved to the civil standard that the assertions made in the Cheshire Constabulary documentation provided had been made out simply on the basis of the information contained on the Cheshire Police databases, NSPIS command and control crime recording system, the niche criminal intelligence reports and the PNC police national computer. The Judge clearly had engaged with that evidence, but found that evidence

was insufficient to prove the Claimant had actually engaged in such activities rather than simply showing he had been accused of such activities. The Judge highlighted the failure of the Secretary of State to produce witness statements or other testimony that could be challenged and tested regarding its weight, in order to substantiate the allegations made against the Claimant. In the circumstances of this case, those were findings open to the Judge on the evidence before her. She has properly and adequately explained her reasons in that regard. Although the Claimant accepted he had previously taken drugs, his evidence was that was many years before and the Judge was entitled to accept that evidence.

10. Further, in respect of the criticisms regarding the Judge's finding that the Claimant was taking an active role in his child's upbringing, although criticism was made of there being no independent evidence to corroborate the claim that the Claimant's child stayed with him 3 to 4 days a week, in support of his ex-partner's evidence, the Judge did hear from both the Claimant and his ex-partner in that regard, and clearly accepted the evidence of Miss R. and the fact that her son stays with his father (the Claimant) 3 to 4 days a week and that he is providing her with £30 per week cash in child maintenance and also buys toys and clothes for his child. It is not an error of law for a Judge to find a witness or a Claimant to be credible, and there did not need to be supporting corroborative evidence for the Judge to accept her evidence in that regard if she found that evidence credible.

11. Although it is argued that the fact that she could not give the Claimant's address undermined her evidence in that regard, the clear oral evidence recorded in the record of proceedings was that the Claimant picked up his son from Miss R. and returned him to her, and not that she was actually picking the child up from his property, but in any event, she was able to describe in her evidence (as recorded by the First-tier Tribunal Judge in the Record of Proceedings) that she had not been to his address but it was 5 minutes travel in the car from the child's school and the school was about a 5 minute walk to her house.

12. I find that the findings made by the Judge in accepting that evidence of Miss R. were open to her on the evidence, and is not perverse or irrational. It was further open to the Judge to accept her evidence that Miss R. was receiving £30 from the Claimant in child maintenance, together with him buying clothes and toys. Even if the amount he was providing was argued to be very small compared to his income of £1,000 and that there was said to be not an adequate role in his upbringing, the Judge was entitled, in light of the amount of time that the Claimant spent with his son and the fact that financial provision was being given, to find that that was an active role in the child's upbringing. There is no set amount of an income that has to be provided in child support or payments in kind, in order for a parent to be actively taking a role in his child's upbringing and the Judge took into consideration not just the financial payments, but the payments in kind and also significantly the time spent by the Claimant with his son.

13. The Grounds of Appeal therefore do not in themselves reveal any material error of law in the decision of First-tier Tribunal Judge Colyer.

14. However, at the appeal hearing I noted that First-tier Tribunal Judge Colyer had allowed the appeal under the Immigration Rules and had specifically decided that having allowed the decision under the Rules, it was unnecessary to go on to consider the appeal under Article 8 on Human Rights grounds. Given that the Claimant lodged his original Human Rights application on the 25th February 2016, and the date of the Secretary of State's decision was the 3rd November 2016, this is a decision to which the new more limited right of appeal applied, pursuant to Section 82 of the Nationality, Immigration and Asylum Act 2002, and the only permitted grounds of appeal were those set out within Section 84 of the Nationality, Immigration and Asylum Act 2002, as amended. In this case, the only applicable ground was that the decision was unlawful pursuant to Section 6 of the Human Rights Act 1988.

15. Miss Everett, acting quite properly and fully in accordance with her duty to the Tribunal, conceded that as the Immigration Rules had been amended to reflect the Secretary of State's view on Article 8, should I not agree with the Secretary of State in respect of the Grounds of Appeal, and should I find that First-tier Tribunal Judge Colyer

had adequately taken account of the evidence from Cheshire Constabulary, and made adequate findings in respect of the Claimant's conduct not having been proved, and if I were to find that Judge Colyer had adequately explained and made proper findings in respect of the relationship the Claimant had with his son and that he was playing an active role in his son's upbringing, then in such circumstances, even though First-tier Tribunal Judge Colyer was legally in error in allowing the appeal under the Immigration Rules, rather than on Article 8 grounds, Miss Everett conceded, acting on behalf of the Secretary of State, that in such circumstances the decision of First-tier Tribunal Judge Colyer should be set aside in respect of the appeal having been allowed under the Immigration Rules and that I should remake it, allowing the appeal on Human Rights grounds under Article 8. She conceded that it had not been argued before the First-tier Tribunal that the appeal should not have been allowed on Article 8 grounds if the Judge found that the Rules were in fact met and that further, there was no evidence to show any change in circumstance since the date of the Judge's decision.

16. In making such concessions, Miss Everett quite properly acted in accordance with her duty to the Tribunal. In light of the concession made on behalf of the Secretary of State, I therefore do set aside the decision of First-tier Tribunal Judge Colyer, to the limited extent that she allowed the appeal under the Immigration Rules, but preserve all of the other findings made by her, including that the provisions of the Immigration Rules were met, I do in light of the concession made remake the decision, allowing the Claimant's appeal on Human Rights grounds under Article 8 in respect of his family life in the UK.

17. In making such a decision, I have fully taken account of the provisions of Section 117A-D of the Nationality, Immigration and Asylum Act 2002, and the fact that the maintenance of an effective immigration control is in the public interest, and that it is in the public interests that people who seek Leave to Remain are able to speak English and are financially independent. There is no dispute that the Claimant is able to speak English and is financially independent, as the evidence that he gave to the Tribunal was that he earned £1,000 per month, which was accepted by First-tier Tribunal Judge Colyer. He also gave evidence in English to the Tribunal. Further, although little weight should be given to a private life established at a time when the Claimant is in the UK

unlawfully or when his immigration status is precarious, the Claimant in fact meets the Rules in respect of his family life, and given that in the light of the findings of Judge Colyer that the family life provisions are met, and in light of the concession made on behalf of the Secretary of State, I do find that the decision taken is disproportionate to the legitimate public end sought to be achieved. I do allow the appeal on Human Rights grounds under Article 8 in respect of his right to a family life with his son. I therefore remake the decision allowing the appeal on Human Rights grounds under Article 8.

Notice of Decision

The decision of First-tier Tribunal Judge Colyer does contain a material error in that she allowed the appeal under the Immigration Rules. I therefore set aside the decision to the limited extent that she allowed the appeal under the Immigration Rules. However, I preserve all of her other findings of fact.

I remake the decision allowing the appeal on Human Rights grounds under Article 8.

In light of the circumstances of this case, which does involve a child, it is appropriate for there to be an anonymity direction. Unless and until the 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

RFMcGinty

Deputy Upper Tribunal Judge McGinty Dated 2nd March 2018

TO THE SECRETARY OF STATE

Fee Award

Judge Colyer did not make any fee award in this case, and that aspect of the decision was not challenged by the Claimant. I therefore do not make any fee award, notwithstanding that the Claimant has been successful.

Signed

Deputy Upper Tribunal Judge McGinty Dated 2nd March 2018