Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/06432/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 16 October 2019	**On 28 October 2019**

Before

UPPER TRIBUNAL JUDGE CANAVAN
UPPER TRIBUNAL JUDGE KEITH

Between

KARAMDEEP [H]
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the appellant: The appellant represented himself.
For the respondent: Mr S Kotas, Senior Home Office Presenting Officer.

DECISION AND REASONS

Introduction

1. This is the remaking of the decision in the appellant's appeal against the respondent's refusal of his human rights claim. These are the approved record of the decision and written reasons which were given orally at the end of the hearing on 16 October 2019.

2. The appellant, an Indian citizen, previously appealed against the decision of First-tier Tribunal Judge O'Malley (the 'FtT'), promulgated on 23 October 2019, by which she dismissed his appeal against the respondent's refusal on 26 February 2018 of his human rights claims. That decision had in turn refused the appellant's application for leave to remain, based on his family life with his son, born on 21 February 2018. The son, who does not need to be named for the purposes of these proceedings, is a British citizen, being born to a British citizen mother in the UK. The appellant is no longer in a relationship with his son's mother.

3. The respondent rejected the appellant's application, first, on the basis of the appellant's suitability, specifically because of his criminal conviction for violence against his son's mother, for which he was sentenced to six months in prison on 5 July 2016 and was the subject of a restraining order, which was due to expire after the respondent's decision. Second, the respondent did not accept that the appellant played an active role in the upbringing of his son; or had a genuine and subsisting parental relationship with him. The respondent also did not accept that there would be very significant obstacles to the appellant's integration in India, his country of origin.

The FtT's decision

4. The FtT identified the sole issue under appeal as being the nature of the appellant's relationship with his son. She considered section EX.1.(a) of appendix FM of the Immigration Rules; and section 117B(6) of the Nationality, Immigration and Asylum Act 2002, and in particular, whether the appellant had a genuine and subsisting relationship with his son, who was a 'qualifying child' for the purposes of those provisions.

5. Having considered the evidence as a whole, the FtT found that while the appellant had last seen his son in January 2018, and while he did not have an active role in his son's upbringing, nevertheless the appellant had a genuine and subsisting relationship with his son, via social media up to March 2018 and was a party to family court proceedings to gain further access to his son. The FtT concluded that it would not be reasonable to expect the appellant's son to leave the UK. Noting that family court proceedings were continuing and referring herself to RS (Immigration and family court proceedings) India [2012] UKUT 218 (IAC), the FtT concluded that the proceedings were not intended to frustrate the appellant's removal; that the appellant has a family relationship with his son, so that his article 8 rights would be engaged for at least the duration of the family court proceedings and, at [64], 'further, if contact is ordered'.

The grounds of appeal and grant of permission

6. The respondent lodged grounds of appeal on 30 November 2018. The gist of these was that: (1) the FtT should have adjourned the hearing pending a conclusion of the family court proceedings; (2) the FtT had erred in concluding that there was a

genuine and subsisting parental relationship in the absence of contact between father and son after April 2018; (3) the FtT's reasoning was inadequate as to how family life could be interfered with in circumstances of the existing limited contact; (4) the FtT had ignored the appellant's criminal offending in a proportionality assessment of the appellant's article 8 rights, noting that this was not a deportation case; (5) the FtT had not considered whether refusal of leave to remain would be unjustifiably harsh for the appellant's son, for the purposes of GEN.3.2 of appendix FM.

7. First-tier Tribunal Judge M Davies initially refused permission on 12 November 2018. He regarded the respondent's grounds as merely a disagreement with the FtT's decision and findings, which were unarguably open to her to make on the evidence before her. Upper Tribunal Judge King granted permission on a renewed application on 28 December 2018, observing that there was no subsisting parental relationship and he regarded the basis of the FtT's decision to allow the appeal as unclear. At a hearing on 22 March 2019, Deputy Upper Tribunal Judge Jordan concluded that the FtT had erred in law in appearing to have granted indeterminate leave, prior to the conclusion of family court proceedings. DUT Judge Jordan set aside the FtT's decision and regarded it as appropriate that the Upper Tribunal should remake the decision, in light of developments in the family court proceedings. There were no preserved findings. These reasons are to remake the decision.

The hearing before us

8. The appellant was not legally represented, but we ensured that he was able to engage in the proceedings, by checking his understanding of the issues and process. We confirmed our understanding of the issues before us, with which Mr Kotas also agreed, which were as set out by the Court of Appeal in MA (Pakistan) and others [2016] EWCA Civ 705 and in particular, the questions outlined by Lord Justice Elias ([19] and [20]):

> *"[19] The only questions which courts and tribunals need to ask when applying section 117B(6) are the following:*
>
> *(1) Is the applicant liable to deportation? If so, section 117B is inapplicable and instead the relevant code will usually be found in section 117C.*
>
> *(2) Does the applicant have a genuine and subsisting parental relationship with the child?*
>
> *(3) Is the child a qualifying child as defined in section 117D?*
>
> *(4) Is it unreasonable to expect the child to leave the United Kingdom?*
>
> *[20] If the answer to the first question is no, and to the other three questions is yes, the conclusion must be that article 8 is infringed."*

9. In this regard, we also considered the authority of SR (subsisting parental relationship – s117B(6)) Pakistan [2018] UKUT 00334 (IAC) and noted that even a limited parental relationship may be genuine and subsisting ([40]). Whether it would be reasonable to expect the appellant's son to leave the UK should be answered

without any consideration of the appellant's poor immigration history: KO (Nigeria) & Ors v SSHD [2018] UKSC 53. It is a hypothetical question, which needs to be asked even if, on a 'real world' analysis, there is no prospect of the appellant's son leaving the UK.

The respondent's submissions

10. Mr Kotas's submissions focussed on whether the appellant had a genuine and subsisting parental relationship with his son. What was said was that if the appellant had not seen his child since January 2018 and had not even spoke to him or had any form of social media contact after April 2018, there could not possibly be a parental relationship between the two.

11. We asked Mr Kotas if he had any submissions in light of the authority of SR (subsisting parental relationship, s117B(6)), to which we have already referred. In that case, Upper Tribunal Judge Plimmer had considered the circumstances of contested parental access to a child, albeit in that case, the appellant father had been able to re-establish face-to-face contact, following family court proceedings, around five months prior to the hearing before Judge Plimmer, whereas here we were at an earlier stage in family court proceedings. Judge Plimmer had concluded that there was a genuine and subsisting parental relationship with the appellant and his child, whereas Mr Kotas sought to distinguish that case because face-to-face contact between the father and the child had been re-established, but it has not been re-established yet between the appellant and his son.

The appellant's evidence and our findings

12. The appellant showed us family court documents on his mobile phone, the contents of which we accepted as reliable and accurate, and which Mr Kotas did not dispute. We also had disclosure of additional family court documents. In the context of the stringent requirements prohibiting the disclosure of family court documents without that court's approval, approval had previously been sought and given.

13. The Swansea Family Court had previously made orders following a hearing on 16 November 2018, providing for the appellant to have staged access to his son, while the son continued to live with his mother, as follows:

> *"Contact order*
>
> *Contact via post ('Stage 1')*
>
> *(3) The [appellant, referred to as the 'respondent in the family court proceedings] must send the child a letter and/or a parcel each month for a period of three months:*
>
> *(i) including photographs of the [appellant]*
>
> *(ii) demonstrating an interest in the child's life, in an age-appropriate manner; and,*
>
> *(iii) the child is expected to reply.*

Upon the [appellant] fully committing to Stage 1, Stage 2 will commence.

Telephone contact ('Stage 2')

The [appellant] must phone the child each week for a period of eight weeks.

Upon the [appellant] fully committing to Stage 2, Stage 3 will commence.

Supervised contact ('Stage 3').

The child's mother must make the child available to spend time with [the appellant] on a supervised basis once a fortnight initially. Contact must be supervised by a professional.

There is no timeframe in respect of Stage 3 and any further progression of contact is subject to the [appellant's] commitment and the child's response to the [appellant]."

14. The appellant's evidence, which we accept as truthful, was that whilst he had complied with both Stages 1 and 2 and had last been in telephone contact with his son around three weeks ago, ie. in September 2019, rather than April 2018, his former partner was not co-operating with access at Stage 3. He showed us a contact centre referral form arranged via Cafcass for a supervised meeting under Stage 3 on 22 May 2019, which supported his evidence that he had complied with Stages 1 and 2 by that date, but his son's mother had failed, in breach of the family court order, to arrange for his son to attend the supervised meeting. Consequently, the appellant had applied for an enforcement order. A hearing to consider that application had been scheduled for 8 October 2019 but that hearing was adjourned, because of the late-stage pregnancy of his current partner. His evidence of that hearing, its adjournment and rescheduling for 11 November 2019 was corroborated by correspondence from the family court.

15. We find that the appellant has complied with Stages 1 and 2 of the staged contact process and that without any fault or criticism of the appellant, he has attempted to engage in Stage 3, with the meeting in May 2019. We find that he is attempting to remedy the breach of his right to do so in the court; and that those legal proceedings are active and are current with a hearing due to take place on 11 November 2019. Considering those facts in the context of the authority of RS (Immigration and family court proceedings) India, we find that the family court proceedings are not contrived for the purpose of frustrating the appellant's removal and instead, the facts are consistent with a sustained commitment by the appellant to have a parental relationship with his son, over a period of time, such that contact is ready begin at 'Stage 3' of the contact order process.

Applying the law to the facts

16. It is accepted that the appellant's son is a qualifying child for the purposes of section 117B(6) of the 2002 Act. The appellant is not liable to deportation. The remaining questions asked in MA (Pakistan) and others are first, whether the appellant has a genuine and subsisting parental relationship with his son, and second, whether, noting that child's best interests, it would be reasonable to expect that son to leave the UK. Lord Justice Elias had indicated that if there were such a relationship and it

would not be reasonable to expect that child to leave the UK, then the appellant's article 8 rights would be infringed.

17. Based on our findings of fact, we had no hesitation in concluding that the appellant has a genuine and subsisting parental relationship with his son, for the purposes of section 117B(6) of the 2002 Act. The appellant has engaged in access with his son at both Stages 1 and 2, showing a consistent pattern of recent, reciprocal involvement with his son, including telephone contact as recently as three weeks ago. The fact that he has not reached Stage 3 is not for want of his trying, and his application for an enforcement order is further evidence of the development of that relationship. While the family proceedings are not as far advanced as those which were before Upper Tribunal Judge Plimmer SR (subsisting parental relationship, s117B(6)), and while we are conscious not to treat the facts before her as precedent facts which bind us, we reflected on that case as authority for the principle that even where a parental relationship is a narrow one based on limited contact, it may nevertheless be genuine and subsisting. Applying that principle here, it is clear that progression through the staged contact process, supervised by the court, with the aim being face-to-face contact between the appellant and his son, does amount to a genuine and subsisting parental relationship. These circumstances are entirely different from where the family court never envisages any form of direct contact or involvement in a child's life. The fact that Stage 3 has not yet been reached does not make that conclusion premature; rather, it is the final stage in a lengthy process, which has already involved regular reciprocal engagement. Had we considered the question of whether the appellant had a family life with his son for the purposes of article 8 of the ECHR regardless of the test under section 117B(6), we would have concluded, based on the same facts, that family life did exist, and indeed it was the very purpose of the staged contact process to protect and nurture that family life. We refer to that because of a suggestion by Mr Kotas that the provisions in section 117B(6) did not reflect the test for a family life under article 8.

18. Mr Kotas suggested that we could not speculate on the appellant's son's best interests in considering whether it would be reasonable to expect him to leave the UK. We do not accept that submission. The child's best interests are of paramount interest to the Swansea Family Court, which has regarded a continuing parental relationship between the appellant and his son to be sufficiently important to make stage contact orders, with the very aim of progressing to face-to-face contact. We regard those orders as reflecting the starting point for the son's bests interests, namely to have a meaningful parental relationship with the appellant. Adopting a 'real world' analysis of that child's best interests, he is a British national, whose mother is also a British national and who has had sole residential custody of him for the entirely of his life. It is highly unlikely that she would be willing to relocate to India, the appellant's country of origin, particularly in the context of her estrangement from him and her previously being the victim of his domestic violence. It would unquestionably be in the child's best interests to remain in the residential custody of his mother, who lives in the UK, while continuing to have a parental relationship with the appellant, leading to regular face-to-face contact, not via social media.

19. We consider more widely, beyond the son's best interests, whether it would be reasonable to expect that child to leave the UK. The facts weighing against it being reasonable are clear. The child is a British national, who has lived in the UK for the entirety of his life, which is a weighty consideration, as is the fact that his mother has sole residential custody of him. While in the UK, he has the benefit of his interests being supervised by the English Courts. It could not be reasonable to expect his mother, the victim of previous domestic violence by the appellant, to relocate to the appellant's country of origin, a country with which she has to familiarity or connections. In the circumstances, to expect the appellant's son to leave the UK would either result in his separation from his mother, and to expect him to live with his father in India; or to expect the mother to transfer the entirety of her life to India. Neither proposition is reasonable. In the circumstances, it would be unreasonable to expect the appellant's son to leave the UK.

20. In the circumstances, the appellant meets the requirements of section 117B(6) of the 2002 Act. As a consequence, the public interest does not require his removal. As made clear in MA (Pakistan) and others, the effect is that the appellant's rights under article 8 are infringed. He has a family life with his son, which would be interfered with by his removal, and there is no public interest in that removal, so that it must breach his rights under article 8.

21. In reaching these conclusions, we do not have any view on what form of leave the respondent should permit the appellant to have in the UK. That is a matter for the respondent. We conclude that the appellant's removal in consequence of the decision would be unlawful under section 6 of the Human Rights Act 1998.

Decision

22. The appeal is ALLOWED on human rights grounds.

Signed J Keith Date: 25 October 2019

Upper Tribunal Judge Keith

TO THE RESPONDENT
FEE AWARD

The appeal has succeeded. We regarded it as appropriate to make a fee award of £140.

Signed J Keith Date: 25 October 2019

Upper Tribunal Judge Keith