Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: UI-2021-001746
[HU/03901/2020]

THE IMMIGRATION ACTS

Heard at Field House, London	**Decision & Reasons Promulgated**
On Thursday 25 August 2022	**On Thursday 6 October 2022**

Before

UPPER TRIBUNAL JUDGE SMITH
DEPUTY UPPER TRIBUNAL JUDGE LEWIS

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

-and-

MR RASHID ASGHAR

Respondent

Representation:
For the Appellant: Ms A Ahmed, Senior Home Office Presenting Officer
For the Respondent: Ms P Heidar, AA Immigration Solicitors

DECISION AND REASONS

BACKGROUND

1. This is an appeal by the Secretary of State. For ease of reference, we refer to the parties as they were before the First-tier Tribunal. The Respondent appeals against the decision of First-tier Tribunal Judge Richard Wood promulgated on 7 September 2021 ("the Decision"). By the Decision, the Judge allowed the Appellant's appeal against the Respondent's decision dated 24 February 2020, refusing the Appellant's human rights claim (Article 8 ECHR). The claim was made in the context of an application to remain

based on the Appellant's relationship with his son, [M]. [M] is a British citizen. The child lives with his mother, Miss Aribah Malik but the Appellant has continuing contact with him.

2. The Respondent refused the Appellant's application on suitability grounds due to a conviction for sexual assault for which the Appellant was sentenced to a term of four months. The Respondent also relied in this regard on the Appellant's failure to discharge a litigation debt which arose in the context of an earlier judicial review application. The Appellant claims that he did not receive any notification of the debt.

3. Even if the Appellant did not fail on suitability grounds, the Respondent pointed out that the Appellant could not satisfy the Immigration Rules ("the Rules") as the parent of a child because he is an overstayer. He could only satisfy the Rules if paragraph EX.1 of Appendix FM to the Rules ("Paragraph EX.1") applies. The Respondent did not accept that Paragraph EX.1 applies because she concluded that the Appellant was not in a genuine and subsisting parental relationship with [M].

4. In relation to the conviction, the Judge found that the suitability grounds of refusal were not made out. He found that the Appellant did not fail on the basis that his presence was not conducive to the public good as the Respondent contends ([33], [34] and [36] of the Decision). In relation to the litigation debt, the Judge accepted the Appellant's evidence that he was unaware of the debt ([35]). The Respondent failed to provide any evidence of it or that the Appellant had been notified of it.

5. The Judge accepted that the Appellant has a genuine and subsisting parental relationship with [M] ([39] to [41] of the Decision). The Respondent accepted that it would not be reasonable to expect [M] to relocate to Pakistan with his father. Accordingly, the Judge accepted that Paragraph EX.1 was met. He therefore allowed the appeal. He also concluded that the appeal should be allowed on human rights grounds outside the Rules.

6. The Respondent appeals on four grounds which are summarised as follows:

   Ground one: the Judge failed to provide adequate reasons to justify his findings in relation to suitability.

   Ground two: the Judge failed to provide adequate reasons for concluding that Paragraph EX.1 is met.

   Ground three: the Judge has materially misdirected himself in law in relation to Paragraph EX.1.

   Ground four: The Judge failed to provide adequate reasons for his conclusion that the Appellant succeeds on human rights grounds outside the Rules.

7. Permission to appeal was granted by First-tier Tribunal Judge Grant on 2 November 2021 in the following terms so far as relevant:

> "... 2. In the light of the appellant's conviction for a sexual offence resulting in him being categorised as a sexual offender, his attempt to evade his prosecution by travelling illegally to Italy, his return to the UK illegally and his failure to pay a costs order made against him arising out of a hopeless JR application, it is arguable that the Judge has erred in law by giving inadequate reasons for his finding that the matters referred to are not a sufficient [sic] to establish that the appellant's presence is not conducive to the public good.
>
> 3. It is further arguable that the Judge has erred in law in misapprehending and misapplying the Exception EX.1 and in giving inadequate reasons for his findings.
>
> 4. Lastly it is arguable that the Judge may have erred in law by giving inadequate reasons for allowing the appeal outside of the Immigration Rules.
>
> 5. All of the grounds may be argued."

The matter came before us to determine whether the Decision contains an error of law. If we were to conclude that it does, we must then decide whether the error should lead to a setting aside of the Decision and, if we set it aside, we must either re-make the decision or remit the appeal to the First-tier Tribunal to do so.

8. We had before us a core bundle of documents relevant to this appeal, the Respondent's bundle before the First-tier Tribunal and the Appellant's bundle before the First-tier Tribunal. We do not need to refer to the bundles before the First-tier Tribunal. However, Ms Ahmed referred extensively to the Respondent's written submissions made to the First-tier Tribunal after the hearing before Judge Wood ("the Submissions"). Ms Heidar indicated that Judge Wood had directed that the Submissions be made because, as Judge Wood noted at [30] of the Decision, the appeal was poorly prepared by the Appellant's representatives and therefore extensive new evidence emerged orally in the course of the hearing (see also [19] of the Decision confirming the Judge's direction).

9. After hearing oral submissions from Ms Ahmed and Ms Heidar, we concluded that the Respondent had not established that the Decision contains an error of law. We indicated that we would provide our decision in writing which we now turn to do.

DISCUSSION

10. We deal with the grounds in the order they are pleaded.

Ground One

11. The Judge dealt with suitability at [33] to [36] of the Decision as follows:

> "33. ...the fact that Miss Malik takes the trouble to facilitate the contact which I have found exists, is testament to the importance which

she places on the appellant's continuing involvement, and his enthusiasm to be involved. The circumstances are obviously very difficult, and it would have been easy for either to have abandoned the exercise. Both have chosen to put the interests of [M] high on their list of priorities. It is a reminder that this Tribunal must do the same. It seems to me that this reflects well on the appellant. In my view, this is a relevant consideration when looking at whether his presence in the UK is conducive to the public good.

34. Mr Yates is right when he observes that the appellant has a very poor immigration history. I have set out those matters above, and I take them into consideration when I have regard to the question of suitability. I also take into account the convictions he has for sexual assault/harassment. Such offences must always be a serious matter. The immigration rules require me to have particular regard to the length of sentence, which in this case was relatively short i.e. 4 months. I also have regard to the fact that the offence was committed in 2015, and that he has not committed other criminal offences since then. Indeed, this seems to have been the only occasion when the appellant had committed offences. He is otherwise of good character, in terms of offending.

35. In relation to the litigation debt, I agree with Ms Heidar. I have seen no evidence that such a debt exists in the appellant's name. In order to prove such a debt, it was incumbent on the respondent to provide me with a copy of the order, or some other proof. I have seen no documentary evidence on this aspect of the refusal. I therefore find that the appellant is not in breach of paragraph S-LTR.4.4.

36. It is my view that the matters set out are not sufficient to trigger paragraph S-LTR.1.6. It is a finely balanced decision. However, having regard to the case as a whole, I find that the respondent was wrong to come to the conclusion that the appellant's presence in the UK was not conducive to the public good."

12. Ms Ahmed drew our attention to [5] to [11] of the Submissions. Although ground one is pleaded as a failure to give adequate reasons, her oral submissions were focussed on what she said was the Judge's failure to have regard to certain considerations. As we accept, whether a person's presence is not conducive to the public good based on character and conduct is not necessarily limited to criminal offending. It is capable of encompassing a poor immigration history. Although that factor was not raised in the decision under appeal, it was relied upon in the Submissions.

13. The difficulty with Ms Ahmed's reliance on this point, however, is that the Judge did have regard to this as a relevant factor. He referred to it expressly at [34] of the Decision and said he had taken account of what was said earlier in that regard (see in particular [3] of the Decision setting out the immigration history and the reference to the Submissions in that regard at [19] of the Decision).

14. Ms Ahmed also submitted that the refusal under paragraph S-LTR.1.6 of the Rules ("Paragraph S-LTR.1.6") is mandatory (as we accept) and the Judge had failed to take that into account when dealing with the criminal conviction. We reject that submission. The issue under Paragraph S-LTR.1.6

is whether "[t]he presence of the applicant in the UK is not conducive to the public good because their conduct (including convictions which do not fall within paragraphs S-LTR.1.3 to 1.5), character, associations, or other reasons, make it undesirable to allow them to remain in the UK". The answer to that question was for the Judge to decide. This is not a rule which relies on the Respondent's own view of the matter. The Judge took into account the nature of the offence. He also took into account however the length of sentence and that this was one offence, committed some six years earlier. He found, in effect, that the Appellant would not commit another offence as he had not done so since and was now prioritising contact with his son over all else.

15. We do not find it necessary to refer to the Tribunal's decision in Mahmood (paras. S-LTR.1.6 & S-LTR.4.2.; Scope) [2020] UKUT 376 (IAC) to which Ms Ahmed directed our attention. The Tribunal there made clear that Paragraph S-LTR.1.6 is a mandatory ground for refusal ([50] of the decision). However, that was in response to the appellant's submission that it was discretionary in nature. The facts of that case were entirely different to those in this appeal.

16. In relation to the litigation debt, Ms Ahmed pointed us to [2] of the Decision where the Judge referred to the judicial review brought by the Appellant and that "[t]hese proceedings gave rise to a litigation debt in the appellant's name which has not yet been paid". She said that this amounted to an acceptance by the Judge that the litigation debt exists which is contrary to what is said at [35] of the Decision (as set out above).

17. We reject that submission. The Judge at [2] of the Decision is merely recording the history as set out in Respondent's decision under appeal. He is not making any finding in that regard.

18. Ms Ahmed also referred us to [12] and [13] of the Submissions. However, other than repeating the matters relied upon by the Respondent and contending that the Appellant's "assertion [that he did not receive the court order] is unsubstantiated", the Respondent has provided no other evidence. As Ms Heidar pointed out, the Submissions misunderstand the Appellant's evidence. The Appellant clearly stated in this witness statement that he had "never been informed" of the debt.

19. We enquired of Ms Ahmed why there was no evidence of the debt and if such could have been produced. She informed us that there was only a note on the Home Office system and she had been unable to track down a copy of the order. The Judge was therefore entitled to reach the finding he did that there was no evidence.

20. The Judge was entitled to reach the findings and conclusion he did in relation to suitability for the reasons he gave. Those were adequate. He took into account all relevant factors.

Ground two

21. The Judge's reasons for accepting that Paragraph EX.1 is met in this case are set out at [31] and [32] of the Decision:

> "31. ... I accept that the appellant sees [M] multiple times a week. I do not necessarily accept that he sees him every day. However, even if he meets [M] for 1-2 hours on three occasions each week, that is a significant period of time in a 2 year old's life. He spends that time playing with him and feeding him. The context of the meetings imposes limitations on the activities that are available to them, as does [M]'s age. I accept that sometimes the appellant is left alone with [M], and is by necessity required to exercise some direct parental care.
>
> 32. Of course, he does not live with [M]. I accept that he is precluded from even visiting the family home because Miss Malik's family are oblivious to his existence. Inevitably, by reason of the circumstances of his situation, I find that he makes little if any important decisions in [M]'s life. I accept that he may have been to a GP appointment but that as a matter of course he does not attend such appointments. He could not have participated in events such as health visitor appointments because he was not permitted to go to Miss Malik's home address. Miss Malik is the primary carer, and makes the vast majority, if not all, of the decisions about [M]'s life. This is a reality of the situation in which they find themselves."

22. Ms Ahmed took issue with the Judge's findings about the credibility of the evidence of the Appellant and Miss Malik. As the Judge recognised at [27] of the Decision, central to his consideration of the relationship between the Appellant and [M] was "the credibility of this part of the appellant's testimony".

23. Ms Ahmed drew our attention to [21] to [23] of the Submissions which set out the Respondent's submissions about the credibility of the evidence of the Appellant and Ms Malik. These concerned the Appellant's claim that he attended every medical appointment which contrasted with the documentary evidence and Ms Malik's evidence, and a conflict between the evidence of the Appellant and Ms Malik concerning the frequency of the Appellant's contact with his son. Ms Ahmed submitted that the Judge's acceptance of Ms Malik as a "believable witness" at [28] of the Decision was undermined by these inconsistencies. She also submitted that the Judge's findings about the unsatisfactory way in which the evidence emerged undermined his acceptance of that evidence.

24. In order to consider these submissions, it is necessary to set out what the Judge said about the evidence at [28] and [29] of the Decision:

> "28. In my judgment, the appellant was telling me the truth about his contact with [M], and the background to his relationship with Malik. I come to this conclusion in part because it was corroborated by Miss Malik. I found her to be a believable witness. She had the unease of a person who found themselves in a difficult situation, which was consistent with the testimony both gave to me at the hearing. Whilst there were some differences in their account, they gave broadly the same evidence as to their joint predicament. They did so quite independent of each other on the day. They both diverged from their witness statements in the same way, even under cross-examination.

> 29. In truth, the appellant and his representatives have made it as difficult as possible for me to come to this view of the appellant's credibility. His witness statement (as well as Miss Malik's) were completely devoid of some of the most important parts of the case. There was no detail of where he met [M], or what he did with him. There was no mention of the fact that Miss Malik's family were unaware he was the father, and had never met him, or that consequently meetings between the appellant and [M] were arranged and held in secret. Moreover, neither witness was asked any further questions by way of examination in chief at the hearing. As Mr Yates rightly suggested in his submissions, it was left to Mr Yates and myself to get to the bottom of the situation."

25. The first point to make is that the Judge's findings as set out at [31] and [32] of the Decision take into account the inconsistencies on which the Respondent relies. The second is that those inconsistencies do not undermine Ms Malik's evidence. They may cast doubt on the truthfulness of the detail of the Appellant's testimony but the evidence which the Judge found to be preferred was that of Ms Malik. That is consistent with his reliance on her as a truthful witness.

26. Flowing from the acceptance of the relationship as described by Ms Malik, the Judge accepted that the Appellant sees his son frequently although not necessarily as frequently as the Appellant said he did. The Judge also accepted that it could not be the case that the Appellant attended every medical appointment. The Judge's conclusion about the nature of the relationship was therefore predicated on what he accepted the position to be factually as set out in Ms Malik's evidence. There is no inconsistency in relation to the Judge's finding that Ms Malik is a credible witness. Although the Judge did not rely on the detail of the Appellant's evidence, as he said at [28] of the Decision, the Appellant's evidence was "broadly the same" when it came to the contact he has with [M] and the nature of his relationship with [M]'s mother.

27. In relation to the way in which the evidence emerged, the Judge expressed dissatisfaction with this. However, that was because the evidence was not contained in written statements but came out only during cross-examination. That did not mean that the Judge was not entitled to believe it. He found the evidence to be broadly consistent. He was therefore entitled to rely on it.

Ground three

28. The Respondent asserts in her grounds that, even if the Judge was entitled to rely on the evidence given by the Appellant and Ms Malik "such contact… cannot be said to amount to a relationship which involves any decision-making or any primary care, such as to amount to a genuine subsisting parental relationship as defined in [case law]". Reliance is placed in particular on SR (subsisting parental relationship – s117B(6)) Pakistan [2018] UKUT 334 (IAC) ("SR").

29. The guidance given in SR reads as follows (so far as relevant):

> "(1) If a parent ('P') is unable to demonstrate he / she has been taking an active role in a child's upbringing for the purposes of E-LTRPT.2.4 of the Immigration Rules, P may still be able to demonstrate a genuine and subsisting parental relationship with a qualifying child for the purposes of section 117B(6) of the Nationality Immigration and Asylum Act 2002 ('the 2002 Act'). The determination of both matters turns on the particular facts of the case…. "

30. As the headnote in SR makes clear, determination whether there is a genuine and subsisting parental relationship is fact sensitive.

31. The Respondent further relies on references to other case-law within the decision in SR. We did not find either reference of assistance. The case of JA (meaning of "access rights") India [2015] UKUT 225 (IAC) (referred to at [11] of the decision in SR) was concerned with indirect access in an entry clearance case. The Appellant's contact with [M] is not indirect.

32. The case of Secretary of State for the Home Department v VC (Sri Lanka) [2017] EWCA Civ 1967 ("VC") (referred to at [14] of the decision in SR) might be said to be closer on its facts as those are set out in SR ("the position of a parent with limited, 'non-caring', contact with a child"). However, when one looks at the Court of Appeal's judgment in that case, it is clear that the facts are very different. The two children in that case were being placed for adoption and, although the appellant father had some limited contact, that would cease altogether once adoption orders were made. Although the plans for adoption did not bear fruit, the children remained in long-term foster care with only very occasional contact with their father. Further, as is also clear from the description of the judgment in SR, another relevant factor is the extent of "direct parental care". The Judge found at [31] of the Decision that the Appellant did provide "some direct parental care".

33. Of course, the issue for us is not what findings we might have reached on the evidence but whether Judge Wood has erred in law. It cannot be said that the Judge did not have regard to the case-law (which is as set out at [24] of the Submissions as well as in the grounds). The Judge referred at [30] of the Decision to his gratitude to the Presenting Officer "for directing [him] to some helpful authorities on the point" (whether there was a genuine and subsisting relationship). He refers at [31] of the Decision to there being "direct parental care" which is a nod to the Court of Appeal's judgment in VC.

34. The Respondent does not say that the Judge's finding that Paragraph EX.1 is met is perverse. She says only that "it is not accepted" that the Appellant plays an active role in [M]'s life. That is the language of disagreement and not error of law.

Ground four

35. We can deal with this ground very shortly for the following reasons. First, if the Judge was entitled to conclude that the Appellant succeeds within the

Rules (as we have concluded), then any error in relation to his findings in relation to the claim outside the Rules is immaterial. Second, the error is said to lie in a failure properly to take into account the public interest when determining the claim outside the Rules. However, as we understood Ms Ahmed to accept, section 117B(6) Nationality, Immigration and Asylum Act 2002 is in the same terms as Paragraph EX.1. Since the Respondent accepted that [M] could not reasonably be expected to relocate to Pakistan, if there were no error in the Judge's finding about the nature of the Appellant's relationship with [M] within Paragraph EX.1, the outcome would be the same when considering Paragraph 117B(6) outside the Rules.

CONCLUSION

36. We fully accept that the Judge's findings and conclusions in this appeal might be said to be generous. We acknowledge that other Judges might well have reached the opposite conclusions. However, it cannot be said that the Judge was not lawfully entitled to reach those findings and conclusions. Nor does the Respondent contend that the findings and conclusions were perverse. For the reasons set out above, the Respondent's grounds are merely a disagreement with the outcome. They do not establish any error of law in the Decision. Accordingly, the Decision is upheld with the consequence that the Appellant's appeal remains allowed.

DECISION

The Decision of First-tier Tribunal Judge Richard Wood promulgated on 7 September 2021 does not involve the making of an error on a point of law. We therefore uphold the Decision with the consequence that the Appellant's appeal remains allowed.

Signed: L K Smith

Upper Tribunal Judge Smith Dated: 1 September 2022