



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: HU/04858/2016

THE IMMIGRATION ACTS

Heard at Field House  
On 21 May 2018

Decision & Reasons Promulgated  
On 24 May 2018

Before

UPPER TRIBUNAL JUDGE McWILLIAM

Between

[T A]

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: unrepresented

For the Respondent: Ms A Fijiwala, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Pakistan. His date of birth is 7 May 1986. He made an application for leave to remain which was refused on 10 February 2016. He appealed against that decision.

2. The appellant's appeal was dismissed by First- Tier Tribunal Judge Moore in a decision of 1 June 2017 following a hearing on 24 May 2017. The appellant was granted permission on 4 April 2018 by First-tier Tribunal Judge Alis.
3. The appellant was granted entry clearance on 21 December 2008 as a spouse. On 28 February 2008 before the expiry of his leave he made an application for ILR. This was refused but he was granted leave outside of the rules until 30 November 2014. He was granted another period of leave outside of the Rules until 31 August 2015. The periods of leave were granted because of pending proceedings before the Family Court relating to his son, a British citizen, born her on [ ] 2009.
4. There was no witness statement before the judge. It was accepted by the judge that the appellant was providing financial maintenance to his son. There was Child Arrangements Order before the judge of 29 March 2017. The order stated that contact between the appellant and his son would be for one hour each month on Sunday at a time to be agreed on WhatsApp at a recreation or similar centre and in the presence of the child's mother. There should be further or other direct contact as the parties agree. It was also ordered that the mother should make the child available for a session of indirect contact on Skype on a Friday once each fortnight commencing on 7 April 2017. It was also ordered that the father must have indirect contact and the mother must encourage the child to respond.
5. The appellant's evidence was that the direct face to face contact had not commenced because his son had been ill. The first session had been agreed with the child's mother to take place on 28 May 2017. There had been contact by way of Skype facilitated by the child's mother.
6. The appellant's fear was that he would lose contact with his son should he return to Pakistan. He also stated that his current wife had children here and could not join him in Pakistan. The appellant's evidence was that he and his wife had taken part in an Islamic marriage ceremony on 20 May 2017 (four days before the hearing). There was no witness statement from her. He would be unable to find work there and the village where his parents lived would make it difficult to have indirect contact because problems with internet access.
7. The appellant relied on a CAFCASS report that stated that there should be regular face to face contact between him and his son. Because the appellant had not seen his son for four years, it was recommended that it should initially be controlled and supervised.
8. The judge found that the appellant's marriage was not a material factor and in the light of the precarious nature of his status and dearth of evidence on the issue this is unarguably lawful.
9. The judge then turned to the appellant's son, having considered the CAFCASS report which referenced unsuccessful attempts made by the appellant to see his son

and that contact was recommended by the author. The judge was satisfied that there had been contact by way of Skype 3-4 times over the past 2 months. However, he found that there was a lack of direct contact, following the order, but that this was not the appellant's fault.

10. The judge accepted that if returned the appellant would no longer have face to face contact with his son, but that indirect contact could continue, finding that the appellant could find an internet café in a nearby town. The judge recorded that the appellant accepted in evidence that this was a possibility.
11. The judge found that the best interests of the child would be to continue living with his mother with whom he has always lived and that this would continue should the appellant return to Pakistan. Indirect contact would continue on a regular basis. The judge concluded that he was satisfied that the appellant would not be "airbrushed from his son's life" with reference to the CAFCASS report and that the appellant's son may be able to visit him.
12. The judge found that his financial resources were likely to be limited at least initially on return, but took into account that the appellant worked as a taxi driver in Pakistan before coming to the UK and that he could return to such employment and continue paying maintenance should he wish. The judge accepted that the payments may be less than he was making presently.
13. The judge took into account that he has family in Pakistan including his parents and a brother and four sisters. The appellant accepted that he would most likely return to live with his parents in Kashmir.
14. The judge concluded that there would be no very significant obstacles to integration. The judge dismissed the appeal under appendix FM and 276ADE. In respect of the appellant's recent marriage the judge observed that it was a precarious family life case in so far as his wife and her children are concerned. He concluded that there would not be insurmountable obstacles to integration. He referred to *Agyarko* [2017] UKSC 11. The judge concluded that the decision was proportionate having regard to section 117B of the 2002 Act.
15. The appellant attended the hearing before me unrepresented. He explained to me that following the decision of the FtT he was unable to work and could not afford representation. I gave him the opportunity to address me. I heard submissions from Ms Fijiwala.

#### *The Error of Law*

16. The judge failed to assess the child's best interests in the light of the evidence that direct face to face contact was in his best interests, taking proper account of the CAFCASS report and the court order. Proportionality should have been considered on this basis. This is a material error of law. I set aside the decision.

17. The appellant did not ask for an adjournment. He conceded that he was unlikely to afford legal representation whilst unable to work. However, he stated that given the opportunity he would try to obtain some evidence. Taking into account the overriding objective of the Tribunal, it was my view that a further adjournment of the case would not be in the interests of justice. The appellant was present and able and willing to give evidence. I proceeded to hear the case.

*The appellant's evidence*

18. The appellant's evidence can be summarised. He stated that he has seen his son face to face 10-12 times since the hearing before the FtT. During the meetings his ex-wife is present. The venue, time and regularity of the meetings are determined by his ex-wife, but she complies with the court order. He had not seen his son for many years and to begin with he was shy but he has now begun to open up. The appellant wants to play much more of a role in his son's life, but his only hope of doing so is when his son grows older and has more independence because his ex-wife would not permit this. The appellant presently has no funds as he is unable to work and is unable to seek redress of the family court, in the hope of increasing contact. There is no possibility of his ex-wife cooperating with contact should he have to return to Pakistan. It took many years and ultimately a court order to get this far. He does not totally emotionally support his son and in the present circumstances his role is limited, but this is not his fault. Ideally he would like a greater role.

*Conclusions*

19. The presenting officer submitted that the evidence was insufficient to satisfy the burden of proof, but she did not suggest that the appellant was not credible. In any event, I found the appellant to be entirely credible. He did not attempt to exaggerate his parental role. His evidence was consistent and I accepted it. I accept his oral evidence that he has, since the hearing before the FtT, had a number of sessions of direct contact with his son. The author of the CAFCASS report recommended direct contact between the appellant and his son and expressed fear that the appellant was being airbrushed from his son's life. It is clear that the child's mother has failed to cooperate with contact prior to the court order. The appellant failed to see his son for a significant period. This was as a result of the child's mother failing to facilitate contact and not through his actions. I attach significant weight to the CAFCASS report.

20. Kitchin LJ sets out the general principles when assessing the best interests of the child with within an assessment of proportionality in *TA (Sri Lanka)* [2018] EWCA Civ 260

22. In assessing these rival submissions, it is important to have in mind at the outset the general principles which need to be borne in mind when considering the interests of a child in the context of an Article 8 evaluation. In particular, the

respondent has an overriding obligation to have regard to the welfare of a child in the exercise of her various statutory functions. The best interests of a child are therefore an integral part of the proportionality assessment under Article 8. In carrying out that assessment it is important to have a clear idea of a child's circumstances and of what is in a child's best interests before determining whether those interests are outweighed by the force of other considerations. In carrying out that evaluation, the best interests of the child must be a primary consideration although not necessarily the only primary consideration. It necessarily follows that the best interests of a child can be outweighed by the cumulative effect of other considerations; but no consideration can be treated as inherently more significant than the child's best interests. Ultimately the decision maker must carry out a careful examination and evaluation of all relevant factors with these principles in mind. The question is whether, having regard to the foregoing, there are compelling circumstances which justify the grant of leave to remain outside the immigration rules.

21. The consequences of the decision would be that that the child will not spend time in his father's physical presence subject to the affordability of holidays. However, that would be on the basis that his mother agreed to this and she has a history of non cooperation with contact whilst the appellant is in the UK in the absence of a court order. I find that it is very likely that the appellant would lose contact with his son should he have to return to Pakistan. He did not see his son for four years until he obtained a court order. There is also the affordability of keeping up maintenance which is more likely should the appellant be working here in the UK. The child's best interests are without doubt for his father to remain in the UK; even more so than at the time of the hearing at the FtT because contact has been re-established.
22. Ms Fijiwala submitted that the appellant cannot meet the requirements of the rules because he cannot provide evidence that he is taking, and intends to continue to take an active role in the child's upbringing (E-LTRPT. 2.4). I accept that there was little evidence of the appellant taking an active role presently in his son's upbringing; albeit he intends and would like to. There is no evidence that he is not capable of doing so. That he cannot meet this requirement of the rules, does not reflect his intentions or lack of interest in his son. It is as a result of the child's mother's unwillingness to cooperate with contact over a significant period of time.
23. Ms Fijiwala submitted that the appellant does not have a genuine and subsisting parental relationship with his son. I do not accept this. Whilst the Upper Tribunal in *R (on the application of RK) v Secretary of State for the Home Department (s.117B(6); "parental relationship")* IJR [2016] UKUT 00031 decided that the role a person plays in caring and making decisions is likely to be a significant factor when deciding whether there is a parental relationship, in this case, the appellant's limited role does not undermine his parental relationship, in the light of the history of the case, the findings of the author of the CAFCASS report and the subsequent court order. I am in no doubt that the appellant is in a genuine and subsisting parental relationship with his son and thus the appeal should be allowed under s117B (6). It was not

argued that it would be reasonable to expect the child to leave the UK, it clearly would not be. Ms Fijiwala argued that s117B (6) does not apply because there is no expectation that the child will leave. He will remain in the UK with his mother. I do not accept that s117B (6) does not apply in these circumstances. On a proper reading of s117B (6) the appeal should be allowed.

24. In any event, notwithstanding s117B (6), the decision would breach the appellant's right to family life with his son. Removal is in the public interest. The appellant has been here lawfully, but his stay is precarious. However, he was granted periods of leave pending family proceedings involving his son. He is not an over-stayer. He has not been here for a significant period of time. He entered the UK as a spouse and the marriage produced his son. He can speak English and it was accepted that he has been working here. I accept that the only reason that he was not working at the time of the hearing before me is that he is not permitted to. He had been working up until the decision of the FtT. However, this along with his ability to speak English is a neutral factor. The appellant has a genuine and subsisting parental relationship with a qualifying child. He cannot satisfy the immigration rules because his role in his son's life has been unreasonably limited by the child's mother and not his own actions. I accept that he would like his role to be greater and intends that it becomes so. However, he realises that for this to materialise he will need further intervention of the family court or his son to become more independent of his mother which will inevitably happen as he gets older. However, he has regular direct contact with his son and has managed to rebuild their relationship. It is in the child's best interests for him to remain here in the hope of further developing the relationship. The child's best interests are a primary not paramount consideration. It is a significant factor against removal. Having conducted a proportionality assessment, I conclude that the interference with the appellant's family life outweighs the public interest in removal. The unusual facts of the case amount to compelling circumstances.

25. The appeal is allowed under Article 8.

Signed *Joanna McWilliam*

Date 22 May 2018

Upper Tribunal Judge McWilliam