Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/09394/2016**

THE IMMIGRATION ACTS

Heard at Manchester	**Decision & Reasons Promulgated**
On April 16, 2018	**On April 24, 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE ALIS

Between

MR AJMAL [R]
(NO ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Thornhill, Solicitor
For the Respondent: Mr Bates, Senior Home Office Presenting Officer

DECISION AND REASONS

1. I do not make an anonymity direction.

2. The appellant is an Afghan national. He originally entered the United Kingdom on October 1, 2008 and claimed asylum. The respondent refused his claim and he appealed that decision to the First-tier Tribunal. The Tribunal dismissed his appeal on January 5, 2010 but the appellant remained in the United Kingdom unlawfully.

3. Further submissions were lodged on October 16, 2012 and this led to him being granted limited leave to remain based on his relationship with a British citizen and the fact that they had a child. This leave expired on August 5, 2015. Shortly before

that leave expired the appellant lodged an application for further leave to remain as a parent on July 20, 2015. His application was refused by the respondent on March 2, 2016 and Judge of the First-tier Tribunal Brookfield (hereinafter called "the Judge") refused his appeal in a decision promulgated on February 20, 2017. She dismissed his appeal under the Immigration Rules and article 8 ECHR. On February 26, 2018 I heard submissions that the Judge had erred and I concluded that the Judge had erred by failing to give consideration to the Immigration Directorate Instruction - Family Migration - Appendix FM, Section 1.0(B) "Family Life as a Partner or Parent and Private Life, 10 year Routes" and I adjourned the appeal for further submissions in light of the fact an updated Family Migration policy had been issued on February 21, 2018.

4. I gave the appellant permission to adduce further evidence and I have had regard to a bundle containing a letter from the school, a letter from a friend and some photographs of the appellant and his son together along with evidence of the appellant and his son together in hospital.

5. The representatives agreed at the resumed hearing that no further oral evidence was necessary.

6. The two representatives agreed that the new policy brought in a two-stage test. Firstly, the Tribunal had to consider whether the British child would have to leave the United Kingdom.

7. They agreed that the first consideration, as set out on page 76 of the new guidance, was to consider whether the child would have to leave the United Kingdom. If the child was not, or was not likely to, continue to live in the United Kingdom with another parent or primary carer then section EX.1(a) of Appendix FM of the Immigration was likely to apply.

8. Mr Bates thereafter submitted that as this was a case where the child would remain here with his mother and primary carer then the Tribunal had to consider whether in the round the removal of the appellant was appropriate in light of the all the circumstances of the case taking into account the best interests of the child as a primary consideration and the impact on the child of the appellant's departure from the United Kingdom. If the Tribunal considered this would lead to unjustifiable harsh consequences for the appellant and/or the child leave would fall to be granted on the basis of exceptional circumstances.

9. Mr Thornhill did not agree with this approach and referred to pages 76 and 77 of the aforementioned guidance which said that where the appellant had a very poor immigration history or a criminal record then only then would public interest considerations point to removal.

AGREED FACTS

10. Following the dismissal of his asylum appeal in January 2010 the appellant remained illegally in the United Kingdom and began a relationship which led to his son being conceived. His son was born on [ ] 2012 and is a British citizen and is now aged 5 ½ years of age.

11. Based on his relationship with the child and mother the appellant was granted leave to remain until August 5, 2015. Shortly after succeeding with this application the appellant and child's mother separated and his application to extend his current application is based solely on the fact that he was the parent of a British Citizen child.

12. On February 13, 2017 the appellant obtained, by consent, a Child Arrangements Order allowing him unsupervised contact every Sunday between the hours of 11 AM and 6 PM and during the school holidays on a Tuesday between the hours of 12 PM and 6 PM. His witness statement dated January 30, 2017 indicates that whilst his relationship with the child's mother had broken down in 2013 he continued to see his son at her home. The appellant continues to see his son and recently attended with him when he was in hospital for one day.

13. The appellant spoke English and worked. He did claim any public benefits and that there were no negative findings under section 117B of the 2002 Act. Section 117B(6) of the 2002 Act applies. The appellant does not have a very poor immigration history or a criminal record.

FINDINGS

14. The appellant is seeking to be granted leave to remain in the United Kingdom on the basis that he is the parent of a British citizen. He had come to the United Kingdom and claimed asylum and it was only after that claim was refused that he then sought leave to remain in the United Kingdom on the basis that he was in a genuine and subsisting relationship with his partner and that they had a child. Shortly after being granted that leave he and his partner separated so when he came to make a further application for leave to remain his application was based solely on the basis that he was the parent of a British child.

15. The appellant did not meet the Immigration Rules when his appeal was first considered and it seems the case today that in order to meet the Immigration Rules the appellant would have to rely on Section EX.1 of Appendix FM of the Immigration Rules.

16. The child has always lived with his mother and the appellant has lived apart from his son since 2013 although it seems agreed that he has continued to see his son throughout this period and he now has the benefit of a Court Order.

17. The child's mother is a British national and she is the primary carer and I can see no situation where this child would ever be required to leave the United Kingdom. This is a case where the relationship between the appellant and the child's mother broke down shortly after the appellant was granted leave to remain in 2013 and the mother has been the primary carer since that time.

18. The respondent's new guidance makes clear that only in circumstances where it was likely the child would have to leave the United Kingdom would Section EX.1 of Appendix FM of the Immigration Rules be engaged.

19. The case therefore falls to be considered outside of the Immigration Rules. Mr Bates argued that the guidance, whilst not law, sets out the respondent's approach to the legislation and he submits that as there is no likelihood of the child leaving the

United Kingdom the issue ultimately comes down to whether it would be unjustifiably harsh to require the appellant to leave the United Kingdom. Mr Thornhill, whilst acknowledging the guidance placed a different twist on the legislation, submitted that unless the appellant had a "very poor immigration history" or a criminal record then it would not be reasonable, according to the guidance, to require the appellant to leave the United Kingdom.

20. I have considered both arguments and I have also considered the full content of the latest guidance which applies in this appeal.

21. The respondent's position, as set out in the 2018 guidance, is different to the position set out in the 2015 guidance. Mr Bates submitted the previous policy had been badly worded and it had never been the respondent's intention that being the parent of a British child meant an appeal must succeed unless that person had a very poor immigration history or a criminal record. If such an approach had been intended then virtually every article 8 parent claim would succeed.

22. It seems to me that this is what the Tribunal has been faced with since the introduction of the 2015 policy and it therefore comes as no surprise that the latest policy switches the emphasis away from the appellant and places the emphasis on whether the child was at risk of having to leave the United Kingdom.

23. The appellant cannot argue that this child would be removed and I agree with the submissions advanced by Mr Bates that if the child is not at risk of removal then there is no longer a presumption, as previously appeared to be the case, that the child's father would be allowed to remain unless he had a very poor immigration history or a criminal record.

24. This does not mean that the appellant cannot succeed in this current application but what it does mean is that there is no longer a presumption that he must be allowed to stay purely because he has a child who is British.

25. Applying Section 117B of the 2002 Act I accept the appellant speaks English, has been in gainful employment and has a genuine and subsisting relationship with his son. Section 117B(6) of the 2002 Act makes clear that where the appellant has a genuine and subsisting relationship with his child and it would not be reasonable to expect the child to leave the United Kingdom the public interest would not require his removal. The respondent's updated policy reinforces the point that the child will not be expected to leave the United Kingdom.

26. Mr Thornhill submitted that if he met the requirements for entry clearance it would be disproportionate to require him to leave the United Kingdom. As things currently stand he does not meet the requirements for entry clearance as he does not have the appropriate English-language certificate. It had of course been open to him to obtain such a certificate bearing in mind the length of time he has been here but for whatever reason he has not chosen to take such a test. Mr Thornhill submitted he would clearly pass the test and whilst that may be the case the fact remains he has not at the date of hearing.

27. The appellant came to this country seeking asylum and when that application was rejected he became an overstayer and the only reason he was allowed to remain in the country was due to the relationship he had with his child's mother and the fact that they had a child. The appellant and his partner separated shortly after he received his leave which meant the only basis the appellant could extend his leave was based on his relationship with his son.

28. The appellant's immigration status is precarious because he has no permanent status in this country. Until such time as he is granted indefinite leave to remain he must always comply with the Immigration Rules. The fact he does not meet the Rules is a factor I must take into account because the public interest requires the maintaining of immigration control.

29. Merely having a British citizen child is insufficient. The fact the appellant's child and his mother are British citizens gives them the right to remain in the United Kingdom but it does not give the appellant the right to remain in the United Kingdom.

30. The issue is one of proportionality and Section 117B (1) of the 2002 Act requires me to have regard to the public interest. The appellant has the option of meeting the Immigration Rules and if so would be entitled to make a formal entry clearance application. That is a factor I must have regard to.

31. Having considered all the above factors I have concluded that it would not be disproportionate to require the appellant to leave the United Kingdom.

DECISION

32. The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law. I set aside the decision.

33. I have remade the decision and dismissed the appeal on human rights grounds.

Signed Date 23/04/2018

Deputy Upper Tribunal Judge Alis

TO THE RESPONDENT
FEE AWARD

I do not make a fee award in this because I have dismissed the appeal.

Signed Date 23/04/2018

Deputy Upper Tribunal Judge Alis