Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/11764/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On Friday 2 November 2018	**On 22 November 2018**

Before

UPPER TRIBUNAL JUDGE SMITH

Between

TAYYAB [S]

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Z Raza, Counsel instructed by Bukhari Chambers Solicitors
For the Respondent: Mr T Melvin, Senior Home Office Presenting Officer

Anonymity
Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008
Anonymity was not granted by the First-tier Tribunal. No application was made for anonymity. There is no reason in this case to make an anonymity direction of the Appellant's name but I have anonymised the names of the two children whose interests are affected by these proceedings.

DECISION AND REASONS

Background

1. By a decision promulgated on 12 December 2017, I found an error of law in the decision of First-Tier Tribunal Judge Colyer promulgated on 23 February 2017 dismissing the Appellant's appeal against the Secretary of State's decision dated 12 November 2015 refusing his application for leave to remain as a parent and based on his private life. I set aside Judge Colyer's decision and gave directions for the re-making of the decision. My error of law decision is annexed hereto for ease of reference.

2. By the time the appeal came before me next, on 24 July 2018, a new matter had arisen namely the Appellant's relationship with a further child, [I]. Since this was a new matter, I adjourned to give the Respondent time to consider this and to consider whether consent should be given for me to take this matter into account. I also indicated that a disclosure order would be sought by the Tribunal from the Family Court in relation to the proceedings involving [I] in order that I could take the evidence from that court into account. My adjournment decision promulgated on 1 August 2018 is also annexed for ease of reference.

3. The Respondent indicated his consent to the Appellant raising the new matter of his parental relationship with [I] by letter dated 2 August 2018. Unfortunately, due to an oversight, the Family Court's consent to disclosure of documents was not forthcoming by the time of this hearing. However, both parties agreed that it was possible to proceed with Mr [S] giving oral evidence as to his current circumstances and without the need to refer to documents arising from or information in relation to the Family Court proceedings.

Evidence

4. The Appellant's child [I] is a British citizen, now aged five years. Mr [S] confirmed that his child [I] lives with him pursuant to a Family Court order. That arrangement is supervised at present by Social Services who meet with him and [I] every three months. The next meeting (for a new social worker to introduce herself) is scheduled for the week following this hearing.

5. [I] has contact with his mother, once per month. That contact is for a period of two hours and occurs at a contact centre. [I] has two half-siblings (of whom the Appellant is not the father) aged two years and nine/ten months respectively. [I] has contact with those two siblings (who live with their uncle) also once per month. The Appellant arranges with their carer to meet between their home and his. [I] attends school in Milton Keynes.

6. The Appellant does not currently work but hopes to do so if his status is regularised. He has worked in the past when he has been able to do so.

7. The background to the arrangements for the Appellant's contact with his other child, [H], is set out in sufficient detail in my error of law decision. Mr [S]

confirmed that he continues contact with [H] on a weekly basis but, by agreement with [H]'s mother, the contact days have been changed and [H] now stays with the Appellant from Friday to Sunday evening. Mr [S] confirmed that [H] and [I], who are half-siblings, get on well together. [H] had already met [I] before he went to live with the Appellant and while [I] was still in care.

Submissions

8. I received written submissions from the Respondent shortly before the hearing. In short summary, the Respondent accepts that the Appellant is in a subsisting parental relationship with [I]. In relation to [H], the Respondent accepts the fact of contact but disputes that [H] is to be considered to be a British citizen. The Respondent relies on the case of Oladeji (s.3 (1) BNA 1981) [2015] UKUT 00326 (IAC). The headnote reads as follows:

> "Whilst s.65 of the Immigration Act 2014, which came into force on 6 April 2015 inserts new provisions into the British Nationality Act 1981 for persons born before 1 July 2006 that create a registration route for those who would currently have an entitlement to registration under the British Nationality Act 1981 but for the fact that their parents are not married, those provisions (like the pre-existing policy set out in Chapter 9 of the UK Visas and Immigration and Nationality Instructions) are predicated on there being an application made under s.3(1) of the British Nationality Act 1981."

Mr Melvin relied in particular on [29] of that decision which reads as follows:

> "[29] But this policy was entitled "Chapter 9: registration of minors at discretion – Section 3(1) British Nationality Act 1981 "and para 9.1.1. made clear that operation of this section was dependent on there being an application. That reflected the statutory requirement set out in s.3(1) which provides that: "[i]f while a person is a minor an application is made for his registration as a British citizen, the Secretary of State may, if he thinks fit, cause him to be registered as such a citizen." (see also s.1(3)(b)). No application was made on behalf of D.A. We would observe that a requirement for an application to be made by persons seeking to acquire nationality by a voluntary act is entirely consonant with international law, certainly where the applicant holds a citizenship already, as in that context it is not necessarily to be expected that they (or their parents if they are minors) will choose to acquire another. There may also [be] important issues regarding consent of the parents."

9. I asked Mr Melvin whether he had any comment on the legal analysis as set out at [18] of my error of law decision which suggests that [H] is in fact a British citizen by operation of law (in particular s1(1) British Nationality Act 1981). That does not depend on any application for registration. He said it was his understanding that it was for the parents to decide whether to apply to register but he accepted that I may be right in my analysis and there may be an entitlement. He also pointed out that [H]'s mother has not made an application for permanent residence relying on her EU law rights.

10. To some extent, the position in relation to [H] is now academic given the Respondent's acceptance of the genuine and subsisting parental relationship between the Appellant and [I]. The Respondent's written submissions on that relationship are that "[it] is one in its infancy and it is very difficult in these circumstances to make a full best interests assessment but given the accepted biological relationship and the conclusions of the family court it would appear that the appellant, should he make an application and subject to what is said above, may succeed under the Immigration Rules."

11. Mr Raza accepted that the Appellant cannot meet the Immigration Rules ("the Rules") under Appendix FM save by application of EX.1. Mr Melvin confirmed that the position in relation to the duration of leave to be granted would be the same whether the Appellant succeeds by application of EX.1 or outside the Rules applying section 117B (6) Nationality, Immigration and Asylum Act 2002 ("section 117B").

12. Mr Raza adopted the analysis of the legal position in relation to [H] as set out at [18] of my error of law decision. The Appellant's ex-wife has been exercising Treaty rights in the UK since 1996 and is therefore entitled to permanent residence (whether or not she has sought a document confirming that status).

13. The Appellant also has a genuine and subsisting relationship with [I] who is accepted to be a British citizen. The best interests of both children are to remain in the UK living with/ having contact with the Appellant. It would not be reasonable to expect either child to leave with him to return to Pakistan.

14. Finally, both representatives confirmed that, in their view, the outcome of this appeal is not affected by the very recent judgment of the Supreme Court in KO (Nigeria) and others v Secretary of State for the Home Department [2018] UKSC 53.

Legal Framework

15. **IMMIGRATION RULES: APPENDIX FM**

Section R-LTRPT: Requirements for limited leave to remain as a parent

R-LTRPT.1.1. The requirements to be met for limited leave to remain as a parent are-

(a) the applicant and the child must be in the UK;

(b) the applicant must have made a valid application for limited or indefinite leave to remain as a parent or partner; and either

(c)

(i) the applicant must not fall for refusal under Section S-LTR: Suitability leave to remain; and

(ii) the applicant meets all of the requirements of Section ELTRPT: Eligibility for leave to remain as a parent, or

(d)

(i) the applicant must not fall for refusal under S-LTR: Suitability leave to remain; and

(ii) the applicant meets the requirements of paragraphs E-LTRPT.2.2-2.4. and E-LTRPT.3.1-3.2.; and

(iii) paragraph EX.1. applies.

Section E-LTRPT: Eligibility for limited leave to remain as a parent

E-LTRPT.1.1. To qualify for limited leave to remain as a parent all of the requirements of paragraphs E-LTRPT.2.2. to 5.2. must be met.

Relationship requirements

E-LTRPT.2.2. The child of the applicant must be-

(a) under the age of 18 years at the date of application, or where the child has turned 18 years of age since the applicant was first granted entry clearance or leave to remain as a parent under this Appendix, must not have formed an independent family unit or be leading an independent life;

(b) living in the UK; and

(c) a British Citizen or settled in the UK; or

(d) has lived in the UK continuously for at least the 7 years immediately preceding the date of application and paragraph EX.1. applies.

E-LTRPT.2.3. Either-

(a) the applicant must have sole parental responsibility for the child or the child normally lives with the applicant and not their other parent (who is a British Citizen or settled in the UK), and the applicant must not be eligible to apply for leave to remain as a partner under this Appendix; or

(b) the parent or carer with whom the child normally lives must be-

(i) a British Citizen in the UK or settled in the UK;

(ii) not the partner of the applicant (which here includes a person who has been in a relationship with the applicant for less than two years prior to the date of application); and

(iii) the applicant must not be eligible to apply for leave to remain as a partner under this Appendix.

E-LTRPT.2.4.

(a) The applicant must provide evidence that they have either-

(i) sole parental responsibility for the child, or that the child normally lives with them; or

(ii) direct access (in person) to the child, as agreed with the parent or carer with whom the child normally lives or as ordered by a court in the UK; and

(b) The applicant must provide evidence that they are taking, and intend to continue to take, an active role in the child's upbringing.

Immigration status requirement

E-LTRPT.3.1. The applicant must not be in the UK-

(a) as a visitor; or

(b) with valid leave granted for a period of 6 months or less, unless that leave was granted pending the outcome of family court or divorce proceedings;

E-LTRPT.3.2. The applicant must not be in the UK –

(a) on immigration bail, unless:

(i) the Secretary of State is satisfied that the applicant arrived in the UK more than 6 months prior to the date of application; and

(ii) paragraph EX.1. applies; or

(b) in breach of immigration laws (except that, where paragraph 39E of these Rules applies, any current period of overstaying will be disregarded), unless paragraph EX.1. applies.

Financial requirements

E-LTRPT.4.1. The applicant must provide evidence that they will be able to adequately maintain and accommodate themselves and any dependants in the UK without recourse to public funds, unless paragraph EX.1. applies.

…

English language requirement

E-LTRPT.5.1. If the applicant has not met the requirement in a previous application for entry clearance or leave to remain as a parent or partner, the applicant must provide specified evidence that they-

(a) are a national of a majority English speaking country listed in paragraph GEN.1.6.;

(b) have passed an English language test in speaking and listening at a minimum of level A1 of the Common European Framework of Reference for Languages with a provider approved by the Secretary of State;

(c) have an academic qualification which is either a Bachelor's or Master's degree or PhD awarded by an educational establishment in the UK; or, if awarded by an educational establishment outside the UK, is deemed by UK NARIC to meet or exceed the recognised standard of a Bachelor's or Master's degree or PhD in the UK, and UK NARIC has confirmed that the degree was taught or researched in English to level A1

of the Common European Framework of Reference for Languages or above; or

(d) are exempt from the English language requirement under paragraph E-LTRPT.5.2.; unless paragraph EX.1. applies.

…

EX.1. This paragraph applies if

(a)

(i) the applicant has a genuine and subsisting parental relationship with a child who-

(aa) is under the age of 18 years, or was under the age of 18 years when the applicant was first granted leave on the basis that this paragraph applied;

(bb) is in the UK;

(cc) is a British Citizen or has lived in the UK continuously for at least the 7 years immediately preceding the date of application; and

(ii) taking into account their best interests as a primary consideration, it would not be reasonable to expect the child to leave the UK; or

(b) …

GEN.3.2.(1) Subject to sub-paragraph (4), where an application for entry clearance or leave to enter or remain made under this Appendix, or an application for leave to remain which has otherwise been considered under this Appendix, does not otherwise meet the requirements of this Appendix or Part 9 of the Rules, the decision-maker must consider whether the circumstances in sub-paragraph (2) apply.

(2) Where sub-paragraph (1) above applies, the decision-maker must consider, on the basis of the information provided by the applicant, whether there are exceptional circumstances which would render refusal of entry clearance, or leave to enter or remain, a breach of Article 8 of the European Convention on Human Rights, because such refusal would result in unjustifiably harsh consequences for the applicant, their partner, a relevant child or another family member whose Article 8 rights it is evident from that information would be affected by a decision to refuse the application.

…

GEN.3.3.(1) In considering an application for entry clearance or leave to enter or remain where paragraph GEN.3.1. or GEN.3.2. applies, the decision-maker must take into account, as a primary consideration, the best interests of any relevant child.

(2) In paragraphs GEN.3.1. and GEN.3.2., and this paragraph, "relevant child" means a person who:

(a) is under the age of 18 years at the date of the application; and

(b) it is evident from the information provided by the applicant would be affected by a decision to refuse the application.

NATIONALITY, IMMIGRATIONAND ASYLUM ACT 2002: PART 5A

ARTICLE 8 OF THE ECHR: PUBLIC INTEREST CONSIDERATIONS

117A Application of this Part

(1) This Part applies where a court or tribunal is required to determine whether a decision made under the Immigration Acts—

(a) breaches a person's right to respect for private and family life under Article 8, and

(b) as a result would be unlawful under section 6 of the Human Rights Act 1998.

(2) In considering the public interest question, the court or tribunal must (in particular) have regard—

(a) in all cases, to the considerations listed in section 117B,

(b) …

(3) In subsection (2), "the public interest question" means the question of whether an interference with a person's right to respect for private and family life is justified under Article 8(2).

117B Article 8: public interest considerations applicable in all cases

(1) The maintenance of effective immigration controls is in the public interest.

(2) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English—

(a) are less of a burden on taxpayers, and

(b) are better able to integrate into society.

(3) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons—

(a) are not a burden on taxpayers, and

(b) are better able to integrate into society.

(4) …

(5) Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.

(6) In the case of a person who is not liable to deportation, the public interest does not require the person's removal where—

(a) the person has a genuine and subsisting parental relationship with a qualifying child, and

(b) it would not be reasonable to expect the child to leave the United Kingdom.

Discussion and conclusions

16. In the absence of any reasoned objection to the analysis put forward at [18] of my error of law decision and for the reasons there set out, I conclude that [H] is indeed entitled to be treated as a British citizen. I accept the documentary evidence (not rebutted by the Respondent) that the Appellant's ex-wife, [BA] has been in the UK since she was about six months old (in late 1996). She came here with her mother who is a Spanish national. [BA] was born in Germany. Her mother's relationship with her father broke down shortly after they came to the UK and, although [BA] continued to have contact with her father, she remained living with her mother in the UK.

17. [BA]'s mother has been employed since coming to the UK. She became self-employed in April 2018. The Appellant has produced HMRC documents for [BA]'s mother beginning in 1986. There is a gap between 1989 and 1998 but records resume in the tax year 1998/1999. There are records of continuing employment history for the period 1999 to 2017. The Respondent has not taken issue with this evidence.

18. Based on that evidence, I am satisfied that [BA] became entitled to permanent residence, from, at the latest, late 2004, as the family member (daughter) of her mother who was exercising Treaty rights. It matters not when precisely she became so entitled provided she was entitled to claim permanent residence (and was therefore settled) when [H] was born on 9 January 2014 as is undoubtedly the case. Neither is it of any legal relevance that [BA] has not applied for a permanent residence card. Her rights arise under EU law and a permanent residence card is only a document reflecting the right which already exists.

19. For those reasons, I am satisfied that [H] is to be treated as a British citizen. It is accepted that [I] is a British citizen. It is accepted that the Appellant has a genuine and subsisting parental relationship with both children.

20. I accept Mr Raza's submission that the Appellant is unable to meet Appendix FM to the Rules as a result of his relationship with [I] and [H] unless paragraph EX.1 applies. Although I accept that the Appellant has not been in the UK unlawfully since he arrived, there is nothing to suggest that he provided the

requisite evidence of his ability to meet the financial requirements under the Rules nor has he provided an English language certificate. He is therefore unable to meet all the eligibility requirements. I therefore turn to consider whether EX.1 applies.

21. Before doing so, it is necessary to consider the best interests of the two children involved in this case, [H] and [I]. Their bests interests are a primary consideration although they are capable of being outweighed by other factors.

22. I have limited information about the children save in relation to their living and contact arrangements. Those arrangements have however been made following orders of the Family Court which will have considered the children's best interests and that those are served, in the case of [H] by living with his mother and having regular (weekly) staying contact with his father and, in the case of [I] by living with his father (the Appellant) and having regular contact with other family members, namely his half-siblings and (supervised) contact with his biological mother. I therefore assume that those arrangements are in the best interests of those children.

23. I turn then to consider whether, in light of those best interests, it would be reasonable for either or both children to leave the UK if the Appellant were removed. I can reach a decision on that point with ease. Both children have their other parent living in the UK. In the case of [H], he lives with his mother who is a Spanish national, settled by reason of her entitlement to permanent residence. There is no suggestion that she would or should be expected to leave the UK with the Appellant and [H] if he were removed. She is no longer in a relationship with the Appellant and has no reason to leave her life here. Furthermore, I have already found that [H] is entitled to be treated as a British citizen. It would not be reasonable to expect him to leave the UK (see for example what is said at [30] to [33] of the judgment in ZH (Tanzania) v Secretary of State for the Home Department [2011] UKSC 4). The Appellant had a very short-lived relationship with [I]'s biological mother who is now married to another man. Prior to [I] coming to live with the Appellant, he was in care as his mother was unable to look after him. However, he continues to have contact with his biological mother and his half-siblings. He too is a British citizen and the observations made in ZH apply with equal force.

24. The Respondent's policy guidance on family and private life is now set out in a document entitled "Family Migration: Appendix FM Section 1.0b: Family Life (as a Partner or Parent) and Private Life: 10 – Year Routes" and was revised as at 22 February 2018 ("the Guidance"). In relation to whether it is reasonable to expect a British child to leave the UK, the Guidance says this (at page 76):

> **"Where the child is a British citizen**
>
> Where the child is a British citizen, it will not be reasonable to expect them to leave the UK with the applicant parent or primary carer facing removal. Accordingly, where this means that the child would have to leave to the

> UK because, in practice, the child will not, or is not likely to continue to live in the UK with another parent or primary carer, EX.1(a) is likely to apply.
>
> In particular circumstances, it may be appropriate to refuse to grant leave to a parent or primary carer where their conduct gives rise to public interest considerations of such weight as to justify their removal, where the British citizen child could remain in the UK with another parent or alternative primary carer, who is a British citizen or settled in the UK or who has or is being granted leave to remain. The circumstances envisaged include those in which to grant leave could undermine our immigration controls, for example the applicant has committed significant or persistent criminal offences falling below the thresholds for deportation set out in paragraph 398 of the Immigration Rules or has a very poor immigration history, having repeatedly and deliberately breached the Immigration Rules."

25. In the recent case of SR (subsisting parental relationship – s117B (6) Pakistan [2018] UKUT 00334 (IAC), UTJ Plimmer concluded that an analysis whether it is reasonable to expect a child to leave the UK "does not necessarily require a consideration of whether the child will in fact or practice leave the UK". Although the Supreme Court in KO (Nigeria) suggested that this might be a relevant factor in the context in which the best interests issue is being considered ([19] of the judgment), in this particular case, it is not necessary to consider how that might apply. There is no suggestion at the present time that [I] could return to live with his mother if the Appellant were removed. This is not a case where both parents will be removed if the appeal fails. Only one parent would be removed, namely the Appellant. That would have the effect of breaking the Appellant's direct contact with [H] who would remain in the UK with his mother and either forcing [I] back into local authority care (where he was before he went to live with the Appellant) or obliging him to leave the UK with his father. If he were to leave with his father, that would have the effect of breaking [I]'s direct contact with his half-siblings and the contact, albeit infrequent and supervised, with his biological mother. Although he is of a young age and might well be able readily to adapt to life in a new country, I am firmly of the opinion that the best interests of the children are to remain living in the UK with the same living/contact arrangements as presently exist.

26. The recent judgment in KO (Nigeria) suggests that this is the end of the assessment. I should not go on to balance the detriment to the children against any countervailing factors. Even if that were not the approach, however, in this case I am unpersuaded that such countervailing factors exist. The Appellant's stay in the UK has been largely if not entirely lawful. It appears (since his leave was curtailed to sixty days) that his leave as a student was curtailed because of an issue relating to his sponsor and not his own fault. It is not suggested he was not a genuine student. It is not suggested that his relationship with his Spanish ex-wife was not genuine whilst it subsisted. He remained here whilst

an application on that basis was under consideration. That application was made in-time and whilst he still had leave. Prior to withdrawal of that application, he made the application which led to the decision under appeal here.

27. I conclude that it is not reasonable to expect [H] and [I] to leave the UK. I therefore accept that EX.1 is met with the consequence that the Appellant is entitled to leave to remain under the Immigration Rules albeit on a ten-year route and not a five-year route.

28. The position would be the same outside the Rules. Whilst, applying section 117B (4), the Appellant's private life may be deserving of little weight (as his status has been precarious), his family life with his children is not to be given less weight because of that factor.

29. The Appellant speaks English and whilst he is not currently working (due I think to his status), he has worked in the past and said he would do so again in the future if his appeal succeeds. I recognise that those are neutral factors.

30. I have already concluded that the Appellant's residence in the UK has been largely if not entirely lawful. Certainly, this is not a case where there is any strong countervailing factor of maintaining effective immigration control.

31. Section 117B (6) involves substantially the same considerations as apply in relation to EX.1. For the same reasons as I have already given in that regard, I accept that it is not reasonable for the two children involved in this appeal to leave the UK. It follows that the Appellant would not, as a result of section 117B (6) be required to leave.

32. Balancing the factors for and against the Appellant, I would therefore have reached the same conclusion outside the Rules as I have within the Rules. Removal of the Appellant would have unjustifiably harsh consequences for the two children involved, particularly [I] who lives with his father.

33. For the above reasons, I allow this appeal.

DECISION

The Appellant's appeal is allowed.

Signed Dated: 15 November 2018
Upper Tribunal Judge Smith

ANNEX: ERROR OF LAW DECISION

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/11764/2015

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On Wednesday 22 November 2017	**12 December 2017**

Before

UPPER TRIBUNAL JUDGE SMITH

Between

MR TAYYAB [S]

Appellants

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr S Bukhari, Bukhari Chambers Solicitors
For the Respondent: Mr T Wilding, Senior Home Office Presenting Officer

Anonymity
Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008
Anonymity was not granted by the First-tier Tribunal. There is no reason in this case to make an anonymity direction.

DECISION AND REASONS

Background

1. The Appellant appeals against a decision of First-Tier Tribunal Judge Colyer promulgated on 23 February 2017 ("the Decision") dismissing the Appellant's appeal against the Secretary of State's decision dated 12 November 2015 refusing his application for leave to remain as a parent and based on his private life.

2. The Appellant is a national of Pakistan. He entered the UK on 16 May 2009 with leave as a student. His leave was extended in that category to 30 August 2014 but then curtailed on 3 March 2014 to 4 May 2014 (presumably based on revocation of his sponsor's licence). On 1 May 2014, he applied for a residence permit as the spouse of an EEA (Spanish) national. However, the marriage broke down before the residence permit was granted and therefore that application was withdrawn on 6 August 2015. Meanwhile, on 21 July 2015 the Appellant made the application which led to the Respondent's decision under appeal.

3. The focus of the appeal and the application for permission to appeal is the Appellant's position as parent of his son who was born to his EEA spouse on 9 January 2014. That child is Spanish due to his mother's nationality.

4. The Appellant's appeal was dismissed by the Decision on the basis that the child's best interests are to remain with his Spanish mother and that the decision to refuse leave to the Appellant was not accordingly disproportionate (although the Judge accepted that the Appellant has access to his child).

5. The focus of the Appellant's grounds is the Judge's determination of the child's best interests. It is said that the Judge was not entitled to find that the child's mother is the primary carer given the evidence that the couple share responsibility for the child. It is argued that the Judge should accordingly have found that the child's best interests are served by remaining with both parents.

6. Permission was granted by First-tier Tribunal Judge Bird on 18 September 2017 in the following terms (so far as relevant):-

> "…
>
> 2. The appellant seeks permission to appeal against this decision on the grounds that the judge made an arguable error of [law] in findings made at paragraphs 60-63 in relation to the best interests of the child.
>
> 3. It is arguable that the best interest and Section 55 of the Borders, Citizenship and Immigration Act 2009 needed to be considered in light of the order for access made by the Judge of the Family Court on 9 October 2015 which the judge sets out at paragraphs 34 and 35. The judge has made an arguable error of law failing to take this order into account in finding that the family life with the child could be continued by electronic means (paragraph 51)"

7. The matter comes before me to decide whether the Decision contains a material error of law and, if so, to re-make the decision or remit the appeal for rehearing to the First-Tier Tribunal.

Discussion and conclusions

8. The terms of the Family Court's orders in relation to the child appear in full at [34] and [35] of the Decision and I do not need to repeat those. In short summary, though, the Court orders that the child should live with the mother and spend time with the Appellant once per month from Saturday morning to Wednesday morning (before nursery) and for every other week from Monday after nursery to Wednesday before nursery. The same arrangements apply during school holidays. A further order prevents the Appellant from removing the child from the UK and the mother from removing the child from the UK except for a holiday for up to 28 days.

9. Since the focus of the grounds and the grant of permission is paragraphs [60] to [63] of the Decision, I set those paragraphs out in full:-

> "[60] I accept the guidance that it is generally the case that it is in a child's best interests to remain with their parents unless special factors apply. In this appeal the child is expected to remain with the mother and continue within that family unit in the UK.
>
> [61] Section 55 does not override the Immigration Rules. Public interest remains the starting point.
>
> [62] I find that the child no longer lives with both parents as the appellant and the child's mother has ceased their relationship with each other. In fact the child's mother is now in a new relationship. Therefore the child cannot remain with both of his parents. I find that the child's mother takes the principal parental role in the child care of the child and that the appellant plays a secondary role.
>
> [63] The position, if the appellant returns to Pakistan, is that the child will remain in the United Kingdom and cared by the mother. The child has been cared for by its mother since birth and it is clearly in his interests to continue to be cared for by his mother. He will remain in the United Kingdom where he may benefit from education and welfare provision available to an EEA citizen and dependents. It is clearly in his best interests to remain here with his mother. I find that the best interest of the child is to remain under the care of his mother, the parent with whom he has lived all his life."

10. I can deal very shortly with Mr Bukhari's submission that the Judge was not entitled to find that the child's mother has the principal role in relation to care and the Appellant only a secondary role. He submitted that this is wrong based on the evidence because of the terms of the Family Court's order which provides for the child to stay with the Appellant for three days each week and longer for one week per month. However, it is abundantly clear from the Family Court's order that the arrangements are for the child to live with his

mother and for the Appellant to have access. This is not a case of shared parental responsibility or shared residence. Furthermore, the Appellant's ex-partner's evidence as recorded at [7] of the Decision is that she is the primary carer. It was therefore open to the Judge to find as he did on the evidence.

11. As Mr Wilding pointed out in his submissions, the Judge took into account the evidence of the Family Court orders and reached findings which were open to him on that evidence. He submitted that the Appellant's complaint is in reality that the Judge has given insufficient weight to the Appellant's relationship with his child. He directed my attention to [32] to [39] of the Decision where the Judge carried out a detailed analysis of that relationship and the weight to be given to it in the Appellant's favour within the Article 8 balance.

12. I accept that there is no error of law in relation to the findings on the evidence in terms of the relationship between father and child. However, I am persuaded that there is an error of law in relation to the child's best interests. I can readily accept the Judge's finding that it is in the child's best interests to live with his mother as that has been the position since his birth. However, there is no consideration by the Judge as to what the child's best interests require in relation to continued (face to face) contact with his father which is the current position.

13. The Family Court when reaching its views on the arrangements for a child will very clearly consider the best interests of the child. That Court has concluded that those interests are served by the Appellant having continued face to face access to his son (including overnight stays for part of each week). The Judge has taken no account of that continued access when assessing the child's best interests. Of course, such assessment is not the end of the matter in terms of the Appellant's claim as the finding of what the child's best interests require is a primary but not the primary or the paramount consideration. However, the Judge's assessment includes no consideration of that factor. For that reason, there is an error of law disclosed by the Decision. Whilst not determinative of the Appellant's appeal, that error is sufficient to be material to the overall conclusion. For that reason, I set aside the Decision.

14. Both representatives accepted that, if I were to find a material error of law in the Decision, the appeal could remain in this Tribunal and I could re-make the decision on the papers without further evidence. However, I have reached the conclusion that I am unable to do so without further submissions from the parties for the reasons I now set out.

15. Mr Bukhari made the point in his submissions that if the Appellant's child were a British citizen or had been in the UK for seven years, then the Appellant would, subject to any other suitability or eligibility considerations, be entitled to remain as a parent under Appendix FM to the Immigration Rules. The problem in this case as Mr Bukhari submitted is that the child is a Spanish national.

16. Following the conclusion of the hearing, though, and in the course of reviewing the evidence in this case, it occurs to me that this may not reflect a wholly correct understanding of that child's legal immigration and nationality status.

17. I have regard to the evidence of the child's mother that, although she remains a Spanish national and has never applied for or been granted British nationality or permanent status, she has lived here from the age of six months, that is to say since about 1997. She is now aged twenty-one years. She has apparently therefore lived in the UK as the family member of qualified person(s) (and may also have been exercising Treaty rights in her own right) for a period in excess of five years and, irrespective of any grant of a permanent residence card, may therefore be a person who is entitled to that status.

18. I have regard also to the position under the British Nationality Act 1981 and the EEA Regulations read together. Section 1(1) of the 1981 Act provides that a person born in the UK shall be a British citizen if at the time of the birth his mother is settled in the UK. Paragraph 2(1) of Schedule 2 to the Immigration (EEA) Regulations 2006 (now paragraph 2(1) of Schedule 3 to the Immigration (EEA) Regulations 2016) provides that for the purposes of the British Nationality Act 1981, a person who has a permanent right of residence for the purposes of regulation 15 shall be regarded as a person who is in the UK without being subject under the immigration laws to any restriction on the period for which he may remain which is itself encompassed within the meaning of "settled" as defined by section 50 of the 1981 Act. Those provisions suggest that a child will be automatically a British citizen if their parent has been in the UK exercising EC Treaty rights under the EEA Regulations 2006/2016 for more than five years and is therefore entitled under EU law to permanent resident status. Without deciding this issue, it appears that the Appellant's ex-partner may have been residing in accordance with the EEA Regulations for a period of five years (at least) and may be entitled to permanent residence within regulation 15.

19. It would of course be wholly inappropriate for me to make any findings about that position without hearing from the parties. I may have misunderstood the factual position in relation to the child's mother or I may have misunderstood the effect of the legislation as applicable to this case. However, since these matters are capable of impacting on the Appellant's entitlement to succeed based on his relationship with his child (particularly under the Immigration Rules), I have given directions below for written submissions to be made on this point. I have given sequential directions because it is necessary first to check the factual position in relation to the child's mother before the Respondent is asked to consider the child's status and the potential impact of the legislation in this case. If either party seeks a hearing in order for further evidence to be given and/or tested on this issue and/or to make submissions orally, I have provided for notice to be given to the Tribunal.

DECISION

I am satisfied that the Decision contains a material error of law. The decision of First-tier Tribunal Judge Colyer promulgated on 23 February 2017 is set aside. I make the following directions for the re-making of the Decision:-

1. **Within 28 days from the date when this decision is promulgated, the Appellant must file with the Tribunal and serve on the Respondent written submissions and any further evidence dealing with the point raised at [17] to [18] of my decision.**

2. **Within 28 days from the service of written submissions and evidence on the Respondent, she must file with the Tribunal and serve on the Appellant her written submissions in response.**

3. **If either party requires an oral hearing to give/test the evidence on the issue raised and/or to make oral submissions, that party must give notice to the Tribunal (copied to the other party) and a hearing will then be arranged.**

4. **If no notice is given by either party, the decision will be re-made on the papers on the first available date following the exchange of submissions provided for at [1] and [2] above.**

Signed Dated: 6 December 2017
Upper Tribunal Judge Smith

ANNEX: ADJOURNMENT DECISION

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/11764/2015

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 24 July 2018	**1 August 2018**

Before

UPPER TRIBUNAL JUDGE SMITH

Between

MR TAYYAB [S]

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Z Raza, Counsel instructed by Bukhari Chambers Solicitors
For the Respondent: Ms N Willocks-Briscoe, Senior Home Office Presenting Officer

Anonymity
Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008
Anonymity was not granted by the First-tier Tribunal. There is no reason in this case to make an anonymity direction.

ADJOURNMENT DECISION AND DIRECTIONS

1. This appeal comes before me for the re-making of the decision following my error of law decision promulgated on 12 December 2017. In that decision, I also gave directions for the filing and service of additional evidence and for written submissions. The background to this appeal is set out in that decision and I do not need to repeat it.

2. By an e-mail dated 17 April 2018, the Appellant filed with the Tribunal additional evidence intended to show that the Appellant's child's grandmother has been exercising Treaty rights in the UK since 1999 and has therefore obtained permanent residence. It is therefore submitted by the Appellant that the child's mother, the Appellant's ex-partner, who came here as a minor child with her mother has permanent residence obtained as her mother's family member during that period.

3. Unfortunately, Ms Willocks-Briscoe indicated that the Respondent had not received the e-mail and attachments until it was re-sent on 21 July 2018. Accordingly, the Respondent was not in a position to make any decision about what that evidence showed or to seek further information. Nor has it been possible to make written submissions.

4. As Ms Willocks-Briscoe pointed out, there is no evidence linking the child's grandmother with the child's mother, such as the child's mother's birth certificate. Mr Raza accepted that this was so and indicated that the Appellant had received from his ex-partner a document setting out the arrangements reached between his ex-partner's parents as to her residence but, although the Appellant's ex-partner can provide her birth certificate, she could not do so in order for the hearing to go ahead as envisaged today.

5. There is an additional matter which has led to my decision to adjourn this hearing again and that is the fact that the Appellant has discovered that he has another minor child living in the UK who is a British citizen. I was informed that he has been granted a residence order in relation to this child, [I].

6. There are two difficulties standing in the way of dealing with that issue at a hearing immediately. First, as Ms Willocks-Briscoe pointed out, and Mr Raza accepted, this is a new matter which was not before the Respondent or the First-tier Tribunal previously. As such, the Respondent has to consent to it. Although, as I observed at the hearing, the basis of the claim is the same as previously, in other words, the Appellant seeks to remain as a parent, it is different in the sense that the child in question is a British Citizen whereas the child relied on to this point is, on the face of it, a Spanish national unless and until such time as his British citizenship can be established (see [18] of my previous decision).

7. Second, the evidence as to the residence order is something which can be obtained only from the Family Court with its permission. I was provided with the details of the case number and Court and a request will be made by the

Tribunal for relevant documents to be obtained from that Court so that those can be disclosed in these proceedings.

8. For those reasons, and with the agreement of the parties, I decided that it was in the interests of justice to adjourn so that, with the consent of the Respondent, all matters relevant to the Appellant's Article 8 rights as a parent can be canvassed at the one hearing. The adjournment will also provide the Appellant with the opportunity to plug the evidential gaps which exist in relation to the status of his other child.

9. I gave directions at the hearing which are set out below. I have not ordered disclosure of the Family Court documents as that is a matter for the Family Court to permit. Those will be disclosed if and when the Family Court gives its permission for such disclosure following the request made to it by this Tribunal (in accordance with the protocol which exists).

DIRECTIONS

1. By Tuesday 7 August 2018, the Respondent shall indicate in writing to the Tribunal and to the Appellant's solicitor whether he consents to the Appellant raising and pursuing within this appeal a new matter, namely his contact with his other child, [IM].

2. By Tuesday 21 August 2018, the Appellant shall file with the Tribunal and serve on the Respondent further evidence dealing with (inter alia) the following issues:

i. The relationship between his ex-partner and the Appellant's child's grandmother, said to be Ms [MA];

ii. The Appellant's ex-partner's own residence in the UK;

iii. Any absences of his ex-partner from the UK.

By the same date, the Appellant is to provide written submissions setting out his case about what the evidence shows.

3. By Tuesday 18 September 2018, the Respondent is to file with the Tribunal and serve on the Appellant his submissions in reply.

4. **The resumed hearing will be relisted on the first available date after 1 October 2018 with a time estimate of ½ day.**

Signed Dated: 24 July 2018
Upper Tribunal Judge Smith