Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/04265/2016

THE IMMIGRATION ACTS

Heard at Birmingham Employment Tribunal	**Decision promulgated**
on 28 February 2019	**On 05 March 2019**

Before

UPPER TRIBUNAL JUDGE HANSON

Between

SH
(anonymity direction made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Miss D Revill instructed by D J Webb & Co Solicitors.
For the Respondent: Mr C Bates Senior Home Office Presenting Officer.

DECISION AND REASONS

1. By a decision promulgated on 3 January 2019 the Upper Tribunal found an error of law in the decision of the First-Tier Tribunal Judge who dismissed the appellant's appeal on human rights grounds. That decision was set aside, it being recorded at [17] of the Error of Law finding:

> "17. The Judge appears to have accepted the primary question is whether it is reasonable to expect the child to leave the United Kingdom. As such the requirements of EX.1 (i) must have been accepted as having been satisfied making the issue that pursuant EX.1 (ii) - whether it be reasonable to expect the child to leave the UK - although there is no clear finding to this effect. The Judge also does not appear to make suitable clear findings concerning the question of reasonableness in the decision. I find on this basis arguable legal error made out."

Background

2. The appellant is a Bangladeshi national born on 5 November 1992 who entered the UK as a visitor on 12 September 2007, when he was 14 years old, and subsequently overstayed.

3. The appellant seeks to remain in the UK based on his family life with his daughter [H] who was born on 13 January 2014 and is currently five years of age. The child is a British citizen through her mother, [B], with whom she lives in Rochdale. [B] and the appellant underwent an Islamic marriage ceremony in 2012 but separated in 2017. The appellant lives in Wednesbury and claims to visit [H] as often as possible.

4. The appellant maintains that his removal would be unlawful under section 6 of the Human Rights Act 1998. In particular, he relies on the Parent route in Appendix FM to the Immigration Rules and on section 117B(6) of the Nationality, Immigration and Asylum Act 2002.

The law

5. It was accepted that the relevant legal provisions are:

Paragraph R-LTRPT.1.1 of Appendix FM which states as follows:

> '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) …' or
>
> (d)
>
> (i) the applicant must not fall for refusal under S-LTR: Suitability leave to remain; and
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> (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.'

The relevant eligibility requirements are as follows:

> '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.

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.'

Paragraph EX.1 states, so far as it is relevant:

'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[.]'

Section 117B of the 2002 Act, to which the Respondent must 'have regard' when assessing proportionality under Article 8, states as follows:

'(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) Little weight should be given to—

(a) a private life, or

(b) a relationship formed with a qualifying partner,

that is established by a person at a time when the person is in the United Kingdom unlawfully.

(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.'

A 'qualifying child' is one who is British or has lived continuously in the UK for seven years or more (section 117D(1)).

6. Case law considered includes *Secretary of State for the Home Department v VC (Sri Lanka) [2017] EWCA Civ 1967*, in which Macfarlane LJ stated that a 'genuine and subsisting relationship' requires that the parent 'must have a "subsisting" role in personally providing at least some element of direct personal care to the child'.

7. *SR (subsisting parental relationship – s117B(6)) Pakistan [2018] UKUT 334 (IAC),* in which Upper Tribunal Judge Plimmer accepted at paragraph 40 that such a relationship was established in the case of a father who saw his child for only three hours every two weeks. Such a parent may be unable to show that s/he is taking an active role in the child's upbringing so as to satisfy Appendix FM, but may nevertheless succeed under 117B(6), which does not require such a role (paragraph 35).

8. In relation to 'reasonableness': in *KO (Nigeria) and others v Secretary of State for the Home Department [2018] UKSC 53*, Lord Carnwath (with whom the rest of the Court agreed) held as follows:

section 117B 'is intended to be consistent with the general principles relating to the "best interests" of children, including the principle that "a child must not be blamed for matters for which he or she is not responsible, such as the conduct of a parent"' (paragraph 15);

the assessment of what is 'reasonable' for a child in section 117B(6) does not involve consideration of the conduct of his or her parents (paragraph 17);

the conduct of the parents may, however, 'become indirectly material, if it leads to their ceasing to have a right to remain here, and having to leave' (paragraph 18); and

the question of 'reasonableness' must be considered 'in the real world in which the children find themselves' – that is, against the

background of the parents' own entitlement (or lack of entitlement) to live in the UK (paragraph 19).

9. The Respondent's guidance document 'Family Migration: Appendix FM Section 1.0b: Family Life (as a Partner or Parent) and Private Life: 10-Year Routes (version 3.0, 23 January 2019) states at page 68:

> 'A child is a qualifying child if they are a British child who has an automatic right of abode in the UK, to live here without any immigration restrictions as a result of their citizenship, or a non-British citizen child, who has lived in the UK for a continuous period of at least the 7 years immediately preceding the date of application, which recognises that over time children start to put down roots and to integrate into life in the UK. The starting point is that we would not normally expect a qualifying child to leave the UK. It is normally in a child's best interest for the whole family to remain together, which means if the child is not expected to leave, then the parent or parents or primary carer of the child will also not be expected to leave the UK.'

10. In *SR*, Judge Plimmer emphasised that section 117B(6) must be applied whenever there is a qualifying child, even if the child is not required or likely to leave the UK. The Tribunal must still allow the appeal if it would not be reasonable for him or her to do so. Insofar as the Respondent's guidance suggests otherwise, it misstates the law. She explained this as follows:

> "[51]First, it is difficult to see how section 117B(6)(b) can be said to be of no application or to pose a merely hypothetical question. Section 117B(6) dictates whether or not the public interest requires removal where a person not liable to deportation has a genuine and subsisting parental relationship with a qualifying child. The question that must be answered is whether it would not be reasonable to expect the child to leave the UK. That question as contained in statute, cannot be ignored or glossed over. Self-evidently, section 117B(6) is engaged whether the child will or will not in fact or practice leave the UK. It addresses the normative and straightforward question - should the child be "expected to leave" the UK?
>
> [52 Secondly, the approach in the 2018 IDI appears to reflect the line of authorities following Case C-34/09 Ruiz Zambrano, [2011] EUECJ C-34/09. Section 117B(6) is not confined to such (EU) cases. It extends to those persons "not liable to deportation". In addition, it self-evidently applies to those who are not EU citizens and can apply to a child who is not a British citizen, but has lived in the UK at least 7 years, to which EU law provides no assistance.
>
> [53] Thirdly, although the straightforward construction of section 117B(6)(b) might appear to provide an overly generous approach to those parents with a genuine and subsisting relationship with a British citizen child living with another parent in the UK, but who cannot meet the requirements of the

> Immigration Rules, it is important to acknowledge the position is markedly different in the deportation context. If a deportation decision had been made against [the appellant], an altogether different approach would apply."

11. In *R (on the application of RK) (s.117B(6); "parental relationship") IJR [2016] UKUT 00031* in the context of section 117B it was held that (i) It is not necessary for an individual to have "parental responsibility" in law for there to exist a parental relationship;

12. Also in *Secretary of State for the Home Department v VC (Sri Lanka) [2017] EWCA Civ 1967* it was said (in the context of the older immigration rules relating to deportation i.e. where there was an exception where there was no family member other than the foreign criminal available to care for the child in the UK) that to have a "genuine and subsisting parental relationship" the parent must have a "subsisting" role in personally providing at least some element of direct parental care to the child. The Court of Appeal also held that each of the words "genuine", "subsisting" and "parental" referred to a separate and essential quality of the relationship.

Discussion

13. Mr Bates was asked to confirm his position at the outset of the hearing. He indicated the primary question he required answering was whether there was a genuine and subsisting parental relationship between the appellant and his daughter H. It was accepted that if such was established it will be unlikely that it could be found that it was reasonable to expect the child to leave the United Kingdom and that, in accordance with the current state of the law and respondent's published policy, this would lead to the appeal being allowed.

14. It is accepted that the appellant does not fall for refusal on suitability grounds. Regarding eligibility, the appellant is the father of [H], who is under 18 and resident in the UK. [H] is British by birth because she was born in the UK to a British mother. [H] lives with her mother, and the appellant claims to have direct contact with [H] in person through a private arrangement. The appellant also submits that he has a genuine and subsisting relationship with [H] and is taking an active role in her upbringing.

15. The appellant's current situation is set out in his latest witness statement, relevant paragraphs of which are in the following terms:

> "12. I wish to confirm that since separating from [B] we have not reconciled and I do not expect this to happen as she is in a new relationship.
>
> 13. However, I continue to see my daughter [H] regularly, perhaps 2 or 3 times a month but I am largely at the mercy of her mother as to when and how often I am permitted to see her. I am aware that I could have the arrangement formalised by

applying to the Family Courts but this would cost yet more money which I do not have.

14. Unfortunately as [H's] mother lives in Rochdale (near Manchester), whereas I live in Darlaston in Wednesbury (near Wolverhampton), it does make visiting [H] a bit of a challenge.

15. As I am not working I do not have access to my own funds and so and reliant on friends and family to give me money so that I can take a train to Manchester and then onto Rochdale or otherwise to give me a lift to Manchester or Rochdale (depending on what is easier for them).

16. When I do visit I will spend a couple of hours with her if a friend/family member has given me a lift (it is unfair to make them wait around for me much longer), but several hours longer if I have taken the train, before I return home.

17. Unfortunately, her mother will not let her stay with me overnight (she says because of her schooling, [H] has only recently started formal schooling) and I do not want to antagonise her by insisting that she does in case she decides to stop letting me see [H] altogether - as things stand we have not had to resort to lawyers to agree contact arrangements and I do not want it to go that way because, as I say, it will be difficult for me to pay for a family lawyer. As it is, I have probably imposed on my friends and family more than they would like to fund this case as well as to provide funds for my upkeep and to see my daughter, they are also the ones giving me money so that I can continue to my daughter's upkeep.

…

25. [B] has made it plain to me that she does not feel any obligation to me beyond giving me access to my daughter. When I mentioned that I will be returning to Court at the end of the month she was very clear that I should not expect her to come to court. It may be unkind to say this, but I suspect that if I was unsuccessful in my appeal that will be something of a blessing to her. I have to tread very carefully with [B] because the reality is that she holds all the cards.

26. I would of course like to see [H] more than I do but I am grateful for the time I have with her. Perhaps in time, her mother's attitude to me will soften and, if I am to get status in the UK, I can find work and accommodation that is more conducive to [H] staying round. I have thought that if that is the case, I would like to move to Rochdale so that much closer to [H] and so that her mother cannot sensibly object to [H] staying with me. I think if she felt that it would not be too disruptive for [H] she might just agree to that."

16. The appellant was cross-examined by Mr Bates regarding copy rail tickets provided and other issues. Whilst it was put to the appellant that no name appeared on the rail tickets, which is arguably correct as they appear to be those obtained at a station which would not have a person's name endorsed on them, they do provide evidence of tickets being purchased to enable a person to travel from Wolverhampton to Manchester and to return on various dates including some in 2018 and 2019. An issue identified by Mr Bates regarding when he asked the appellant when he last visited his daughter and the difference in that date as compared to a date on rail tickets of 29 January 2019 is noted, but as identified by Ms Revill the appellant stated he thought the date provided of 24 January was the date of the most recent visit, although it was 5 days earlier than the date appearing on the rail ticket. It is also correct as identified by Mr Bates at the photographs provided showing the appellant's contact with his daughter, in some including with the appellant's aunt with whom he lives, are undated. I accept there is merit in Ms Revill's argument however that if one looks at [H] in those photographs the child is clearly older in the later ones than the earlier ones. There is also a photograph of [H] receiving a bicycle given to her by the appellant for her a recent birthday which provides a good reference point in terms of relative timelines.

17. Notwithstanding the evidential limitations identified by Mr Bates I find having weighed up the competing arguments that the appellant's account of the issues surrounding the circumstances of his contact with [H] is plausible. Although many couples resolve future arrangements concerning children on separation, not all do, and the appellant's account of having to "tread carefully" to avoid antagonising [H's] mother is not unheard of in many relationships where couples have separated. The 'no order' principle of the Childrens Act is as set out by the appellant in that the Family Court will not get involved or make orders relating to children unless it is necessary to do so. Although the appellant could bring proceedings without legal advice, as many do, it is clear that the foundation of agreement has been reached which may allow for further contact at some future point. This is clearly the appellant's wish which is entirely plausible in all the circumstances.

18. The geographical distance between the appellant's home near Wolverhampton and [H's] home in Rochdale is not challenged which presents logistical issues as identified by the appellant. It is also not disputed that the appellant has no access to income of his own as he is not able to work, and it is plausible that he is therefore dependent upon others to provide resources to purchase train tickets or to drive him to Rochdale when contact is permitted.

19. When asked what active role he plays in [H's] life in terms of decision-making the appellant was frank and honest in stating that he did not. This is not because he does not wish to do so but because [H's] mother will not allow him. The appellant confirmed that she will inform him of matters that have occurred with regard to [H] but no more. This account

fits in with the general description by the appellant of his relationship with [H's] mother.

20. I accept the appellant's account of his contact with [H] is credible and proceed on that basis.

21. In *SR (subsisting parental relationship – s 117B (6) Pakistan) [2018] UKUT 0034* the tribunal held that a parent who was unable to demonstrate for the purposes of the immigration rules that they had been taking an active role in a child's upbringing might still have a genuine and subsisting parental relationship with them as long as the relationship involved an element of direct parental care (referring to VC (Sri Lanka) above).

22. I find the appellant has made out that the necessary element of direct parental care has been established during the time that he is able to enjoy contact with [H]. This has to be assessed in relation to contact the appellant is permitted rather than just a calculation of the number of hours or days within a particular calendar month. If the appellant is only allowed contact a couple of times a month but takes advantage of the same it cannot be said that during that time the necessary element of direct parental care has not been demonstrated.

23. In terms of whether the appellant is taking an active role in [H's] upbringing that role is clearly being carried out by [H's] mother and I accept the appellant does not make decisions in terms of the child's life or have an active input into the same at this point in time. This is an important element for without the same the appellant does not meet the eligibility requirements of the parent route pursuant to Appendix FM and I make a finding of fact to this effect.

24. Any ability to satisfy the parent route is, however, not arguably material for in light of my finding the appellant has a genuine and subsisting parental relationship with [H] section 117B(6) is applicable. The question that then arises is whether it will be reasonable to expect [H] to leave the UK.

25. Both [H] and her mother [B] are British citizens living in the UK. [B] would not relocate to Bangladesh since she is no longer in a relationship with the appellant. If [H] were to accompany the appellant she would have to leave behind both her primary carer and her country of nationality. I find on the evidence this would be contrary to her best interests.

26. Whilst the appellant is an overstaying, this is not relevant to the reasonableness assessment following *KO (Nigeria).* Given that [H's] best interests favour her continuing to have direct contact with both her parents, and that the only country in which this can happen is the UK, I find that as a qualifying child she should not be expected to leave.

Having taken all aspects into account I find that it would not be reasonable for [H] to leave the UK.

27. I allow the appellant's appeal on human rights grounds with reference to section 117B(6), since that is determinative of the proportionality of the proposed interference with the appellant's family life with [H].

Decision

28. **I remake the decision as follows. This appeal is allowed.**

Anonymity.

29. The First-tier Tribunal made an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

    I make such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed…….
Upper Tribunal Judge Hanson

Dated the 1 March 2019