Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/01509/2017

THE IMMIGRATION ACTS

Heard at Birmingham CJC	**Decision & Reasons Promulgated**
On 21st January 2020	**On 5th February 2020**

Before

UPPER TRIBUNAL JUDGE KEITH
DEPUTY UPPER TRIBUNAL JUDGE HALL

Between

'SR'

(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

On the basis that the appeal includes discussion of the appellant's children and allegations of domestic violence, unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. Failure to comply with this direction could lead to contempt of court proceedings.

Representation:

For the appellant: Mrs S Ahmad (morning) and Mr U Javed (afternoon),
representatives.

For the respondent: Mrs H Aboni, Senior Home Office Presenting Officer

REMAKING DECISION AND REASONS

Introduction

1. These are a written record of the oral reasons given for our decision at the hearing.

2. This is the remaking of the decision in the appellant's appeal against the respondent's refusal of his human rights claim, in the context of his application for discretionary leave to remain.

3. The appellant, a citizen of Pakistan, sought leave to remain in the UK on the basis of his human rights, specifically his right to a family life with his daughter, with whom it is said that he has had intermittent contact and access over the years since he entered the UK in August 2003 and she was born on 24 October 2004, although by that time the appellant's marriage to the daughter's mother had ended and the appellant alleged that he had been the victim of domestic violence. Through the period of his presence in the UK, the appellant has been lawfully present with a succession of short periods of leave, initially as a spouse and subsequently periods of discretionary leave, in order for him to maintain or gain access to his daughter. The respondent refused his most recent application for discretionary leave on 5 May 2016, which the respondent refused in a decision dated 9 January 2017. He appealed to the First-tier Tribunal and in a decision promulgated on 15 December 2017, First-tier Tribunal Judge Mathews (the 'FtT') dismissed the appellant's appeal, concluding that the appellant could maintain indirect contact from his country of origin.

4. The appellant appealed. The ground of appeal was that the FtT had failed to consider the respondent's discretionary leave to remain policy and the respondent's policy said to be in force prior to July 2012. The appellant asserted that the policy suggested that an application for discretionary leave, on the same basis of previous grants of leave, should be granted, with a view to an applicant being on a path to settled leave to remain.

5. Permission to appeal was granted by First-tier Tribunal Judge Adio on 2 May 2018 on the basis of the FTT had failed to consider the policy under article 8 outside the Rules.

6. Deputy Upper Tribunal Judge Chapman set aside the FtT's decision in a decision promulgated on 7 June 2019. She noted that a previous application for indefinite leave to remain had been refused and when a challenge to that earlier refusal was raised before her for the first time, she refused that ground of the appeal, noting that no such application to amend had been included in the grounds and that the issue had not been raised before the FtT. However, she allowed the appeal on the basis that the FtT had not adequately considered the lawfulness of the appellant's presence since August 2003. The error of law found related to the period of time spent by the appellant in the UK, rather than the policy which might be a path to settlement, noting that the appellant's application for settled leave to remain had been refused and was not the subject of the appeal. Judge Chapman's error of law decision is annexed to this decision.

The issues in our remaking decision

7. The issues which we needed to consider changed significantly on the morning of the hearing, following discussions with the appellant's

representative, Mrs Ahmad. It related solely to the appellant's private life, rather than any family life with the appellant's daughter. There had been earlier disclosure by the Family Court in accordance with the Family Protocol of documents which suggested that the appellant had gained indirect contact with his daughter and the appellant could apply to the court to expand the basis of his contact, from 1 August 2019. Mrs Ahmad accepted, as confirmed in a supplementary witness statement from the appellant, which was produced on the morning of the hearing, that on legal advice, he had not applied to vary the existing Child Arrangements Order, and did not rely on any relationship with a qualifying child for the purposes of appealing the refusal of leave to remain. Instead, he relied on the fact that he had been in the UK lawfully since his arrival in 2003. He had completed relevant English language tests.

8. We agreed with Mrs Ahmad that the sole issue related to the appellant's private life and that we needed to consider the following questions:

    a. First, noting that it was an appeal outside the Immigration Rules but nevertheless taking those Immigration Rules as our starting point, we had to consider paragraph 276ADE(1)(vi), and whether there are very significant obstacles to the appellant's integration to Pakistan.

    b. Second, whether, on a free-standing analysis outside the Immigration Rules, and noting in particular at sections 117A-B of the Nationality, Immigration and Asylum Act 2002, the respondent's refusal was proportionate.

Discussion on evidence

9. We discussed with Mrs Ahmad that the appellant's claim and evidence was based on solely on the period of time spent in the UK and a bare assertion that if he were removed, it would breach his rights under article 8. The supplemental written witness statement did not deal with any obstacles to the appellant's integration into Pakistan. We discussed with Mrs Ahmad that the bare assertion of a loss of all ties to Pakistan may not assist this Tribunal, noting the authority of Parveen v SSHD [2018] EWCA Civ 932. We emphasised that it was entirely a matter for the appellant as to what evidence he wished to adduce. In response, Mrs Ahmad began by explaining that as there had been difficulties in obtaining instructions from the appellant, his supplemental witness statement had only been obtained on 14 January 2020 and he had not had the opportunity to seek evidence to prove that he no longer had any family relatives in Pakistan. On receiving further instructions, she confirmed that he did in fact have relatives in Pakistan; in particular his mother, maternal aunt and a cousin living in a family property and she was content in the circumstances that we should proceed with a hearing. We agreed that the hearing would restart after the lunchbreak, to give the appellant a chance to produce a further written statement, and Ms Aboni raised no objection to this.

10. On restarting the hearing with Mrs Ahmad's colleague, Mr Javed, in the afternoon, he began by indicating that a further witness statement had not been finalised and that he intended to rely solely on legal submissions. We referred him back to our earlier discussions with Mrs Ahmad, at which point Mr Javed indicated a desire to finalise the statement, albeit it delayed the hearing to even later into the afternoon. It was around 3.15pm that he was able to produce the written statement and we are grateful to Ms Aboni that she was able to prepare swiftly her cross-examination, to enable us to proceed.

11. The gist of the appellant's evidence is as follows. In his earlier statements, he referred to having lived in the UK lawfully since 2003, so that it would difficult for him to relocate to Pakistan after such a period of time. In his additional statement, he conceded that he had visited his family in Pakistan, in 2015, but that the family's circumstances had changed since then. He had no close family relatives to turn to or with whom he had a relationship, except his mother, who was 70 years old and whom he described as 'elderly'. The family did not have a property of their own and did not own any land in Pakistan but his mother lived with her sister and his cousin. The appellant's grandfather, with whom he had stayed in 2005, had died in 2019. The appellant had essentially lost all connections with his relatives in Pakistan. All of his close family members lived in the UK, including his brother, his nieces and his sister. He accepted that he had a 'SIA' licence to work in the security industry but this would not assist him in finding work in Pakistan, and that he used to have a provisional driving licence and fork-lift truck licence, but none of this would assist him in finding work in Pakistan, although he did not explain why in his statement. He had been out of work in the UK since 2017 and was entirely reliant on his brother to support him financially. He did not have the financial means to fund further studies in Pakistan and there were no support organisations to assist him in Pakistan.

12. In oral evidence, when we asked him to explain further about the obstacles to integration in Pakistan, he mentioned first, accommodation. He would be unable to live with his mother and maternal aunt and cousin because they lived in a small property. In terms of work, his SIA licence would not help him as security guards in Pakistan had guns and he had no firearms training. While the documents in his bundle suggested he had qualifications to work as an animal slaughterer, he said that he had only ever hung animals on hooks. He had never seen large-scale food processing plants in Pakistan. Instead, slaughter took place in small family run shops. He also had a bad back and shoulder so couldn't lift heavy carcasses now. While he had a provisional driving licence it had since lapsed.

13. The appellant had seen no forklift truck-drivers in Pakistan and did not believe he could find work as one. He had only seen porters carried things by hand in markets. He accepted, however, that he was basing his knowledge on what he had seen, having never worked in Pakistan prior to leaving there and having done no independent research of his own on the

availability of jobs. He accepted that he had also worked in a bed factory as a machine operator and in a retail shop while in the UK. When asked whether he could work in a shop in Pakistan he said that the shops were small family businesses. While he accepted that he had done manual work before, he could not do so now as he was 39 years' old. Whilst he referred in his witness statement to not owning any property or family members owning any property in Pakistan he accepted that were he in a position to work he would be able to generally rent a property. Whilst he had provided regular financial support to his brother prior to 14 November 2017, he had not worked since November 2017. While he had the right to work, he could not find employment in the UK. He had been living with his brother, on whom he relied entirely.

14. When he was asked why his brother and family in the UK would not continue to provide financial support, he said that his brother would need to be asked. He suggested that this issue had been considered when the brother had given evidence to the FtT, but having reviewed that decision carefully, we observed there was no suggestion or reference to the appellant's brother asserting that he would be unwilling or unable to provide financial support to the appellant, were he removed to Pakistan.

15. The appellant accepted that whilst there had been an absence of contact for three to four months since he had last spoken with his mother, they had a good relationship. His relationship with his aunt was more distant. He had completed education at high school but not beyond that to university level.

Discussion and Findings

16. Following our discussions with Mrs Ahmad, we did not consider the respondent's policy prior to July 2012, noting that this was relevant to the issue of a route to settlement and the appellant's application for indefinite leave to remain had been refused, without challenge.

17. First, we considered whether there were very significant obstacles to the appellant's integration into Pakistan. We were mindful that we should not add a gloss to that and indeed that it would be unhelpful to do so (see Parveen). We had to identify what the obstacles were and assess whether they were very significant. The obstacles, broadly speaking, fell into under three areas. The first obstacle was in relation to the appellant's ability to finance himself or seek financial support from others to assist his integration into Pakistan. The second connected obstacle was in relation to the ability to house himself. The third obstacle was the question of his social isolation and the extent to which he could meaningfully integrate into Pakistani society.

18. We do not accept the appellant's assertion that he would be unable to find work, for the following reasons. First, he can speak Urdu, the language of his country of origin, as exemplified by his choice in giving evidence before us in Urdu. He has no linguistic barrier.

19. Second, he was been educated to high school level and since entering the UK, has experience in skilled manual work (not merely unskilled labouring), with practical experience and qualifications as a machine operator, forklift truck driver, working in a shop, and in a slaughterhouse. In relation to each of those points, the appellant suggested that there would be barriers preventing him from working, for example the need for security guards to have firearms experience. We do not accept the appellant's evidence on these barriers. He has never worked in Pakistan. Whilst that alone might be a potential obstacle, it undermines the reliability of his evidence about experience of the limitations of employment in Pakistan. Moreover, his lack of work in Pakistan cannot be considered in isolation to his substantial work experience in the UK, noting that he has worked consistently from 2003 to 2017. His own brother referred at [8] of his witness statement to the applicant's various employments in the past and his 'many qualifications,' as a result of which the appellant provided substantial support to his brother. By way of example, he has not explained why he could not work as a machine operator in a factory, a previous role he has carried out.

20. Third, in relation to financial support from others, the appellant's brother has, on the appellant's own evidence, provided significant support in terms of accommodation and finances. The appellant has not said that his brother would be unwilling to provide him support and no evidence was ever put before us that the appellant's brother and sister would be unable to assist in financially supporting the appellant, even if for a brief period, to help his integration in Pakistan.

21. In relation to the potential obstacle of accommodation in Pakistan, we do not accept the assertion that merely because the family do not own property in Pakistan that he would be unable to integrate there and the appellant candidly accepted that if he could work in Pakistan he would be able to rent property.

22. In relation to the third potential obstacle, lack of family connections and isolation, we have significant doubts about the appellant's candour. We noted that in his application for leave to remain, the refusal of which he is challenging, the form asked at page [23] of [41] whether he had any family, friends or connections with Pakistan, and he said that he had no family in Pakistan, with all of his family in the UK, which on his own admission, was not accurate and was rejected by the FtT. We noted in the FtT's record of evidence that the appellant's stay in Pakistan in 2015 was not a short one – he stayed for a four-month period from July to November 2015, when he was dealing with the passing away of one of his brothers. The length of such a stay and the fact that he was of sufficient standing within the community in Pakistan to be the person dealing with the passing away of one of his brothers, is indicative of his ties and ability to integrate in Pakistan. The passing away of his grandfather in 2019, which prevents him from staying in that property, does not begin to explain why his standing and connections have disappeared since 2015. He continues to have a good relationship with his mother, with whom he remains in

contact and combined with his close relationships with UK relatives, who would continue to provide him with emotional support, we do not accept that he would be isolated and unable to integrate in Pakistan.

23. We conclude that there are no obstacles to his integration in Pakistan, let alone very significant ones, so that he does not meet paragraph 276ADE(1)(vi) of the Immigration Rules. Nevertheless, it is important that we consider his appeal outside the Immigration Rules, in a free-standing assessment, including by reference to sections 117A and B of the 2002 Act.

24. The appellant has unquestionably established a private life in the UK since 2003, working in a variety of jobs and obtaining a variety of qualifications. That private life will be interfered with as a consequence of the appellant's removal, to a sufficient extent to engage article 8. Noting that the appellant does not meet the Immigration Rules, the refusal is lawful and for a legitimate aim, ie. the maintenance of immigration controls. The all-important question is whether refusal of leave to remain is proportionate. Using a 'balance sheet' analysis, in his favour, the appellant's presence in the UK is for a significant period. He has worked over many years and paid taxes. On neutral points, whilst the appellant has recently relied upon the financial support of his brother, he has not been in receipt of state benefits and therefore he remains for those purposes financially independent. He also has a relevant English language qualification, which again is a neutral factor. Against the appellant, while his private life has been established over a lengthy period, section 117B(5) of the 2002 Act confirms that little weight should be attached to this as while lawful, it was developed when his leave was precarious. His leave was obtained as a series of periods of discretionary leave to access his daughter and he has confirmed that he does not intend to seek to widen that access, which is limited to sending birthday cards and presents indirectly to his daughter. There is no reason that this limited indirect contact cannot continue from Pakistan. While Judge Chapman had concerns that the period of the appellant's presence in the UK had not been considered, we have considered such presence, but confirm that nevertheless, the decision to refuse the appellant leave to remain, where an application for indefinite leave to remain has been refused, is proportionate and does not breach the appellant's rights under article 8 ECHR.

Remaking decision

25. We remake the appellant's appeal by dismissing his appeal on human rights grounds.

Signed J Keith Date 4 February 2020

Upper Tribunal Judge Keith

TO THE RESPONDENT

FEE AWARD

We have dismissed the appeal so that there can be no fee award.

Signed J Keith Date 4 February 2020

Upper Tribunal Judge Keith

ANNEX: ERROR OF LAW DECISION

IAC-FH-LW-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/01509/2017

THE IMMIGRATION ACTS

Heard at Birmingham CJC	**Decision & Reasons Promulgated**
On 14 May 2019	.....

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAPMAN

Between

MR S R
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr S Ahmed, Counsel
For the Respondent: Ms H Aboni, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a national of Pakistan born on 23 March 1980. He arrived in the United Kingdom in August 2003 in possession of entry clearance as a spouse for twelve months. He subsequently applied for further leave to remain on 31 March 2006 on the basis that his relationship had broken down as a result of domestic violence. His application for indefinite leave to remain was refused, but discretionary leave to remain was granted on 28 November 2008 for three years. The basis of the grant of leave appears to have been that the Appellant was in contact with a daughter of the marriage born on 24 October 2004. On 3 November 2011, the Appellant made a further leave to remain application and on 23 February 2012 he was granted discretionary leave to remain for three years. The Appellant applied to extend his leave and his leave was extended until February 2015.

2. On 3 February 2015, the Appellant made an application for indefinite leave to remain based on six years' residence with regard to the transitional provisions of the Secretary of State's discretionary leave policy. On 5 May 2015, he was granted twelve months' leave outside the Rules due to the fact that there were ongoing Family Court proceedings.

3. On 5 May 2016, an application was made on form FLR(O) with a covering letter from his representatives requesting a further twelve months' leave to remain. This application was refused in a decision dated 9 January 2017. The Appellant appealed against that decision and his appeal came before Judge of the First-tier Tribunal Mathews for hearing at Stoke on 24 November 2017.

4. In a Decision and Reasons promulgated on 15 December 2017, the judge dismissed the appeal, essentially on the basis that the Family Court had seen fit to grant the Appellant indirect contact with his daughter and that he could maintain such contact with her from Pakistan.

5. The Appellant appealed against that decision. The sole ground raised in respect of the application for permission to appeal was that the First-tier Tribunal Judge had failed to consider the discretionary leave to remain policy and the transitional provisions that were in force prior to July 2012. It was submitted that the Appellant had completed the residential requirement pursuant to that policy of six years, that the transitional provisions provide that a person will normally continue to be dealt with under that policy through to settlement if they continue to qualify for further leave to remain on the same basis as the original discretionary leave was granted. It was asserted his position had not changed and that the judge had erred in failing to take this into account.

6. Permission to appeal was granted by First-tier Tribunal Judge Adio in a decision dated 2 May 2018 on the basis that:-

> "*The decision does not address the application of the discretionary leave policy under Article 8 outside the Rules and this would have*

been a key issue in deciding the issue of proportionality. The Appellant's grounds raise an arguable error of law."

7. In the Rule 24 response dated 21 June 2018, the Respondent opposed the appeal and raised the point that it appeared on the face of the judge's Decision and Reasons that the argument raised in the application for permission to appeal had not been raised at the hearing before the First-tier Tribunal and the First-tier Tribunal should not be criticised for not dealing with an argument that was not before them. The Respondent further noted that the Appellant had applied for indefinite leave to remain in 2016 and this had been refused, but he had been granted further limited leave to pursue the Family Court proceedings. The current application was for further leave following the outcome of that case, which resulted in the continuation of and direct contact with his child. On the face of it, the Appellant had no legitimate expectation that further leave or ILR could be granted outside the Rules and that the First-tier Tribunal had fully addressed the issue before them.

8. The appeal then came before the Upper Tribunal on 7 March 2019, when the parties made a joint request for an adjournment in order that directions could be made for proper determination of the issue raised in the grounds of appeal at the next hearing, bearing in mind that the grant of permission to appeal was based on a matter raised for the first time in the application for permission to appeal to the Upper Tribunal. I made directions, which are appended to this decision.

Hearing

9. At the resumed error of law hearing, I was handed a copy of a response to directions from the Respondent dated 29 April 2019 which unfortunately had not previously reached the file and I was also handed a skeleton argument on behalf of the Appellant which is undated but did not appear to have been previously served, contrary to the terms of the directions. I set out the content of those documents.

10. The Respondent's letter of 29 April 2019 sets out an extract from Section 10 of the Home Office policy in respect of discretionary leave which is the section dealing with transitional arrangements that applicants granted leave under the discretionary leave policy in force before 9 July 2012. This provides as follows:-

"*10.1 Applicants granted discretionary leave before 9 July 2012*

Those granted leave under the discretionary leave policy in force before 9 July 2012 will normally continue to be dealt with under that policy through to settlement if they continue to qualify for further leave on the same basis as their original DL was granted (normally they will be eligible to apply for settlement after accruing six years' continuous DL or where appropriate a combination of DL and LOTR, see section 8

above) unless at the date of decision they fall within the restrictive leave policy. Caseworkers must consider whether the circumstances prevailing at the time of the original grant of leave continue at the date of the decision. If the circumstances remain the same, the individual does not fall within the restricted leave policy and the criminality thresholds do not apply, a further period of three years' DL should normally be granted.

Caseworkers must consider whether there are any circumstances that may warrant departure from the standard period of leave".

11. The Respondent's letter noted that on 31 March 2006, the Appellant submitted an application for leave to remain based on domestic violence which was refused on 28 November 2008, however due to the circumstances the Appellant was granted DL until 27 November 2011. On 3 November 2011 he submitted a further application for leave to remain outside the Rules and was granted a further period of DL until 23 February 2015. On 3 February 2015 the Appellant applied for ILR on the basis of six years' continuous discretionary leave. This application was refused on 5 May 2015 as the Appellant had not demonstrated that he had had direct contact with his daughter and his circumstances were not such as at the time that he was granted discretionary leave to remain in the UK and therefore it was not considered appropriate to grant ILR. However, he was granted twelve months' leave exceptionally outside the Rules until 5 June 2016 in order to pursue contact with his daughter through the Family Court.

12. A copy of the transitional arrangements and grant of leave on 5 May 2015 and the application pursuant to that grant of leave dated 28 April 2015 were appended along with a grant of discretionary leave dated 28 November 2008 and the notice granting the Appellant discretionary leave on 23 February 2012.

13. The caseworking notes for the 2015 decision were also appended and these provide, inter alia, at page 6 (these were drafted on 5 May 2015):-

"*Do the conditions that led to the original grant of DL still exist? Please note that although the circumstances may have changed it may still be appropriate to grant.*

No. Any short and subsequent grant of DL was on the basis of his relationship with his British daughter. I am not satisfied on the evidence submitted that the applicant has maintained a relationship with his daughter. Indeed it would appear he has had no contact since February 2011 as his family solicitors have lodged an application with the Birmingham Family Court to gain direct contact with his daughter"

and then at page 9:-

> "*Leave outside the Rules consideration*
>
> *Applicant has a British daughter. He has been in receipt of DL since November 2008 on this basis. He however does not appear to have maintained contact with his daughter and has submitted an application with Birmingham Family Court to gain direct contact with his daughter. Following advice from Ian Ballad SEO it has been decided to grant a period of one year to pursue rights of access through the court*".

14. From the Appellant's side, the skeleton argument which is undated asserts at [7]:-

> "7. *Discretionary leave was granted on 28 November 2008 until November 2011 and the Appellant's circumstances were that he was in limited contact with his daughter at the time the original DL was granted.*
>
> *8. In September 2011 the Appellant was not in direct contact with his daughter and in November 2011 DL was further extended until February 2015 within circumstances of indirect contact. It was therefore asserted that there had been no change in circumstance from the discretionary leave application and that the Appellant had an expectation that he will be granted settlement*".

15. At the outset of the hearing, I requested whether either party had either the application or the caseworking notes in relation to the decision by the Respondent dated 23 February 2012 as to whether or not this had been granted. A further three months' DL had been granted due to the Secretary of State's understanding that the Appellant had direct or indirect contact with his daughter. Unfortunately, neither party were able to assist and there is essentially no evidence on this issue.

16. I then heard submissions. Mr Ahmed sought to rely on his skeleton argument. He submitted that this was a historic case. The Appellant had had numerous changes of legal representative and thus the papers were not intact. He sought to rely on the fact the Appellant had been granted discretionary leave to remain twice. He took issue with the assertion by the Secretary of State that the Family Court matter had been finally determined in light of the finding of Judge Mathews at [11] that the Appellant can renew an application for contact following 1 August 2019, so he is essentially in the same position as he was previously and that this was clearly material to an assessment of his case.

17. In her submissions, Ms Aboni sought to rely on the Rule 24 response and her letter of 29 April 2019 and attached documents. She submitted that whilst it is arguable that the Appellant has had various changes of solicitor

which may explain the lack of documentary evidence from his side, it was clear that the Appellant's current solicitors had previously been acting for him in his family matters as per the letter from Kalam Solicitors dated 28 April 2015. She submitted that the issue of whether the Appellant should have been granted indefinite leave to remain under the transitional provisions pursuant to the DL policy was not a matter raised before the judge and therefore he did not make any error of law in failing to consider this. Ms Aboni submitted that when reaching the decision under challenge the Home Office caseworker did consider the discretionary leave policy. By the time the matter came before Judge Mathews the Family Court proceedings had concluded on the basis that the Appellant had indirect contact with his daughter. She submitted it was open to him to find as he did at [38] that the Appellant could maintain indirect contact from Pakistan. Ms Aboni submitted the Appellant could make a further application for contact after 1 August 2019 and that he could pursue any further proceedings in this respect from outside the UK pursuant to the Immigration Rules. She submitted the Appellant had not established that there will be any breach of Article 8 and that the judge had made appropriate findings which were open to him on the evidence before him.

18. I reserved my decision, which I now give with my reasons.

Findings and reasons

19. In respect of the issue of whether or not the Appellant was entitled to indefinite leave to remain, I have concluded that the time to challenge that decision was when the Appellant was granted a period of leave outside the Rules on 5 May 2015 by way of judicial review. No such application was made and it is now far too late to seek to challenge that decision through the prism of the Tribunal appeal procedures. Nevertheless, I find that the Appellant's history of having had continuous leave to be a material factor in any assessment of his human rights appeal and the proportionality of his removal.

20. I make this finding albeit the issue of the Appellant's past or possible entitlement to indefinite leave to remain was not argued as a freestanding point before the First-tier Tribunal. It is apparent from the judge's summary of the Appellant's immigration history at [2] that he has remained with leave essentially throughout since his arrival in August 2003 and the fact that he has remained with leave is not a factor that the judge gave any or any proper consideration to when deciding that his removal would be proportionate. On that basis I find a material error of law in the judge's decision.

21. In light of the fact that the Appellant intends to vary his contact with his daughter from indirect contact to direct contact on or after 1 August 2019, I adjourn the appeal to the first available date after the hearing before the Family Court. I make the following directions:

21.2. The appeal is adjourned for a further hearing in respect of Article 8 to be listed for 1 hour not before 12 September 2019.

21.2. If the Appellant intends to give oral evidence an updated witness statement should be served on the Upper Tribunal and the Respondent 5 working days before the hearing. If an interpreter is required one must be specifically requested;

21.3. If the parties become aware that any further Family Court hearing will not take place prior to 12 September 2019 then they shall inform the Upper Tribunal and the Respondent accordingly so that further directions may be issued;

21.4. The Upper Tribunal shall exercise the Family Protocol in order to obtain copies of any evidence relied upon by the Family Court in the forthcoming proceedings.

Notice of Decision

The appeal is allowed to the extent that the decision of First tier Tribunal Judge Mathews contained a material error of law. That decision is set aside and the appeal is adjourned for a resumed hearing before the Upper Tribunal.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed Rebecca Chapman Date 3 June 2019

Deputy Upper Tribunal Judge Chapman