Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/10835/2018

THE IMMIGRATION ACTS

Heard at Birmingham	**Decision & Reasons Promulgated**
On 1st October 2019	**On 17th January 2020**

Before

DEPUTY UPPER TRIBUNAL JUDGE MAHMOOD

Between

KZ
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr H. Rashid of Counsel
For the Respondent: Ms H. Aboni, A Senior Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant appeals with permission against the decision of First-tier Tribunal Judge Sills in respect of his human rights appeal.

2. Permission to appeal was granted by Upper Tribunal Judge Keith. He observed when granting permission to appeal that:

> *"Whilst the FTT carefully considered and applied the authority of SR (subsisting parental relationship-s117(6) Pakistan [2018] UKUT 00334 (IAC); and the assertion about contesting family proceedings with a sister's assistance from the UK does not appear to be material to the reasoning in the Decision. As the*

> *main difficulty in maintaining contact is said to be the child's resistance to that contact, so these grounds appear to be weaker, the FTT's explanation of why he concluded that there were not very significant obstacles to the appellant's integration in Pakistan, at [14] of the Decision, was arguably deficient, and so amounted to an arguable error of law. Nevertheless permission is granted on all grounds"*

3. In his submissions, Mr Rashid said that there was an order for the Appellant to engage in indirect contact with his child until 2020 with reconsideration thereafter. At [17] it was accepted that there was a biological relationship with the child. The mother had been trying to prevent contact with the father. **AO (Nigeria)** at para 109 was referred to. This paragraph made the position very clear. Mr Rashid said it all came down to an Article 8 proportionality issue. If lawful then not correct. Regarding proportionality, then progress to direct contact. The best interests of the child required the child to remain with both parents. The only issue was whether or not there was a genuine and subsisting relationship.

4. Mr Rashid submitted that the Judge had materially erred in law when considering the case of **JA** and **SR**. Paragraph 15 of SR was relied on. The best interests of the child and progression after 2020 needed to be considered. The Judge's finding that the Appellant was not in a genuine and subsisting relationship was against the law. Paragraph 6, which was ground 2 related to the Appellant having written to the children but the Judge made a finding that he had not done so. There was no challenge to the finding. The other point in respect of ground had said at paragraph 15 what he did about private life, but the Judge had failed to take into account paragraph 276ADE of the Immigration Rules and I should look at paragraph 14 of the decision.

5. Mr Rashid submitted that the Appellant had lived in the UK for 15 years. There was no reasoning in respect of **AO (Nigeria)**. Fairness was raised in ground 3. The issue of the sister was not put to the Appellant despite him being put forward for cross examination. The Judge had pursued the wrong theory in respect of the case. The decision in **MH (Pending Family Proceedings)** made it clear that it was unlawful to remove under Article 8 as the Appellant could not pursue from outside the UK.

6. Ms Aboni in response said she relied on her Rule 24 Reply. She said that the First-tier Tribunal Judge had directed himself appropriately and gave adequate reasons. The Judge did relate his findings and the CAFCASS report and that there was only indirect contact and that there was no genuine or subsisting relationship with his child. Whilst it was accepted that the Appellant does not need to show parental responsibility, the Judge had said that there was no genuine and subsisting relationship and the CAFCASS report had said that there was no full compliance with the letter writing.

7. Ms Aboni said it was open to the Judge that removal would not be disproportionate as there was indirect contact only. The Appellant could continue indirect contact via Skype. It was also submitted that there was no unfairness regarding the sister. The paragraph 276ADE matter was open to the Judge. It was for the Appellant to show very significant obstacles to integration in Pakistan and not for the Judge to look for reasons.

8. In reply Mr Rashid referred to the bundle at CF paragraph 19 whereby the Appellant had sent gifts instead of writing to his daughter. In respect of the fairness ground, the matter had not been raised in court. I should look at paragraph 21. It was submitted that there would be no difficulty in bringing such proceedings. The mother of the Appellant's child is the sister's husband.

9. I observe that at paragraph 4 it was noted in the Judge's decision that the appropriate permission has been obtained from the Family Court for reliance on those documents in these proceedings. I also made clear to the parties that I have some familiarity with the Family Court as I sit as a Recorder on such private and public law proceedings. I told the parties this so that they were not at a disadvantage in terms of some of the terms used in the family court papers so I referred to these long hand by giving explanations of what I understood them to mean.

10. In considering whether there is a material error of law, I set out some of the findings and observation of the First-tier Tribunal Judge. These included:

    (1) The CAFCASS report of September 2018 indicated that the child's hostility to the Appellant was a major obstacle to contact;

    (2) The Appellant had not written to the child as requested but instead had [sent] gifts but which had not assisted the child in preparing her for direct contact;

    (3) The direct contact did not progress due to the child's failure to engage;

    (4) There were concerns that further attempts to establish contact may cause emotional harm to the child;

    (5) It was felt that the mother was not encouraging the child to see her father;

    (6) The CAFCASS report suggested 6 months letter writing followed by video calls for 6 months after which direct arrangements should be considered;

    (7) The final hearing took place at the Family Court in February 2019. The Court made a finding that "*a prime motivation for the Appellant in making the application was in relation to his immigration application*";

(8) The Court ordered indirect contact only in the form of monthly letters for 6 months and then fortnightly Skype or other video-based calling; and any other contact between the Appellant and his child as agreed by the Appellant and the mother;

(9) The relevant immigration rule being Appendix FM E-LTRPT. 2.4 required that there be "direct access";

(10) Paragraph 177B was set out;

(11) The Supreme Court's decision in **Agyarko v SSHD** [2017] UKSC 11 was cited and paragraph 60 set out in respect of the requirement for a fair balance to be struct between the competing public and individual interests involved;

(12) The Judge's findings were that Appendix FM could not be met as there was no direct contact. There was a mandatory requirement which was not. The Appellant had not established any very significant obstacles to integration under Paragraph 276ADE;

(13) In so far as the Appellant's outside of the Rules was concerned, the Judge had considered the cases of **JA (meaning of access rights) India** [2015] UKUT 00225 (IAC). The Judge noted that this case focused on the interpretation of the Rules, which this Appellant could not satisfy. The Judge said he was also referred to the case of **SR (subsisting parental relationship-s117B(6)) Pakistan** [2018] UKUT 00334 (IAC). The Judge noted that the case gave helpful guidance. An individual can demonstrate a genuine and subsisting relationship with a child notwithstanding that they cannot establish they are taking an active role in the child's upbringing;

(14) The Judge accepted that the Appellant was the biological father of the child. The Appellant had lived in the UK for 15 years and he had established private life;

(15) The Judge considered the question of proportionality. He considered s117B(6). There was no direct contact with the child. There had overall been very little indirect contact too. The Appellant had stopped having direct contact with the child in September 2014 when she was aged 1;

(16) Direct contact previously ordered did not take place as the child refused to leave her mother's car;

(17) The indirect contact currently took the limited form of letter writing once per month by the Appellant to his child, as recommended in the Family Court proceedings. Whilst the sending of presents by the Appellant was noted, this was not considered to be helpful there and indeed it was not what had been recommended to the Appellant to do;

(18) Importantly in my judgment, the Judge specifically did note and take into account the obstacles put in place by the child's mother

to the Appellant's relationship with his child were relevant to the overall proportionality;

(19) Having considered all of the matters, the Judge went on to conclude that, "*In circumstances where the Appellant has not demonstrated any involvement in important decisions in the child's li[f]e has no direct contact presently has had no direct contact for a number of years, and only partly complied with letter writing request of the family court, I find that he has not established that he has a genuine and subsisting relationship with his child...".*

(20) The Judge also considered proportionality more generally and noted matters such as the Appellant only having lived in the UK lawfully for 2 out of his 15 years here;

(21) Important the Judge also said, "*Moreover, I note the finding on the final order that a prime motivation for the father in making the application was in relation to his immigration application'*.

11. I refer to some of the case law that that the Judge mentioned. Firstly, in relation to the decision by Upper Tribunal Judge Clive Lane in **JA (meaning of "access rights") India** [2015] UKUT 00225 (IAC), the headnote made clear (I refer in particular to paragraph 1 and 4 of the headnote which I have underlined):

> "*1. Where the Immigration Rules are silent as to interpretation, it may be necessary to refer to the Children Act 1989 (as amended) and other family legislation in order to construe those parts of the Rules which provide a route to entry clearance or leave to remain as a parent.*
>
> *2. "Access" in the latest version of the Immigration Rules means the same as "contact" in the previous paragraph 284A. Neither term is now used in the Family Court where Child Arrangements Orders are made to regulate "(a) with whom a child is to live, spend time or otherwise have contact; and (b) where a child is to live, spend time or otherwise have contact with any person."*
>
> *3. The expression "access rights" in paragraph E-LTRPT.2.4 (a) (i) may refer equally to parents who have "indirect" access to a child by means of letters, telephone calls etc as well as to those who spend time with a child ("direct" access). A parent may also have "access rights" where there is no court order at all, for example, where parents agree access arrangements (the "no order" principle; section 1(5) of the Children Act 1989 (as amended)).*
>
> *4. Having satisfied the requirements of paragraph E-LTRPT.2.4 (a) (i), an appellant must still prove that he/she "is taking and intend to continue to take an active role in the child's upbringing"(paragraph E-LTRPT.2.4 (a) (ii)). Whether he/she will be able to do so will depend upon the evidence rather than the nature of the "access rights." However, it is likely to be unusual that a person having only "indirect" access rights will be able to satisfy this provision. In some cases, Tribunals may need to examine the reasons why the Family Court has ordered "indirect" rather than "direct" access."*

12. I then refer to the case of **SR (subsisting parental relationship-s117B(6)) Pakistan** [2018] UKUT 00334 (IAC) which is also within the Judge's decision. The headnote of Upper Tribunal Judge Plimmer's decision makes clear:

> *"1. If a parent ('P') is unable to demonstrate he / she has been taking an active role in a child's upbringing for the purposes of E-LTRPT.2.4 of the Immigration Rules, P may still be able to demonstrate a genuine and subsisting parental relationship with a qualifying child for the purposes of section 117B(6) of the Nationality Immigration and Asylum Act 2002 ('the 2002 Act'). The determination of both matters turns on the particular facts of the case.*
>
> *2. The question of whether it would not be reasonable to expect a child to leave the United Kingdom ('UK') in section 117B(6) of the 2002 Act does not necessarily require a consideration of whether the child will in fact or practice leave the UK. Rather, it poses a straightforward question: would it be reasonable "to expect" the child to leave the UK?"*

13. Again, this decision also refers to having to consider the particular facts of the case.

14. I then refer to the Court of Appeal's judgment in **AB (Jamaica) and AO (Nigeria) v SSHD** [2019] EWCA Civ 661. Singh LJ gave the first judgment, but King LJ's judgment is referred to by him and I shall refer to that first because it succinctly deals with the indirect contact appeal, which is more relevant in the matter before me. King LJ said (I have underlined several lines for relevance),

> "109. In order to demonstrate a genuine and substantial parental relationship, it is common ground that it is not necessary for the absent parent to have parental responsibility and, in my judgement, it is hard to see how it can be said otherwise than that a parent has the necessary "genuine and substantial parental relationship" where that parent is seeing his or her child in an unsupervised setting on a regular basis, whether or not he has parental responsibility and whether or not by virtue of a court order. Equally, the existence of a court order permitting direct contact in favour of the absent parent is not conclusive evidence of the necessary parental relationship. It may be that a court would conclude that there is no "genuine and substantial parental relationship" where, for example, a parent has the benefit of a court order but does not, or only unreliably and infrequently, takes up his or her contact.
>
> 110. So far as indirect contact is concerned, it should be borne in mind that the Family Court typically strives to promote regular, unsupervised, face to face contact between a child and his or her parent. If a court limits that contact to indirect contact only, that is because the court, in a decision making process in which the child's welfare is paramount (Children Act 1989, section 1) has decided that such a significant limitation on the parental relationship is in the best interests of the child in question and the reasons for such a

> decision having been reached by the judge will be highly relevant to the tribunal's consideration of section 117B(6)(a).
>
> 111. Having said that, whilst perhaps more likely, it is by no means inevitable that a tribunal will conclude that a parent has no "genuine and substantial parental relationship" absent direct contact. It may be that there has been a long gap in contact and that indirect contact marks a gentle re-introduction, or that a parent has to show (and is showing) commitment to indirect contact before direct contact can be introduced. Where however a Family Court has made a final order limiting contact to indirect contact, particularly when there is no provision for progression to direct contact, the tribunal should look closely at the reasons which led to the court making such a restrictive order."

15. Singh LJ said,

> "100. The Respondent AO was restricted by an order of the Family Court in the contact which he could have with his son R in a very substantial way. Although that can be described as "indirect contact", in the sense that direct contact was prohibited, it was of a very limited kind even of indirect contact. In essence he was permitted to communicate with his son only by post and, furthermore, those letters, postcards and presents had to be sent to the address of the maternal grandparent and not to R or his mother's address."

16. I am aware also of the helpful earlier decisions of the Upper Tribunal over which McFarlane LJ has presided. As indicated above, I am also well aware of the difference between the best interests of the child being the primary consideration as enacted within the Children Act 1989 and applied in the Family Court and the best interests of the child being a primary consideration in the First-tier Tribunal and Upper Tribunal.

17. Having set those matters out, it is also useful to refer to some of the documents provided to the First-tier Tribunal by the Appellant from his family law proceedings. One of the bundles is dated 5 April 2019 and is addressed to the Home Office Presenting Officer's Unit. It was sent by the Appellant's former solicitors (Messrs Rose Dean Solicitors of Birmingham who were formerly Stratford Solicitors). Within that bundle there is an order of His Honour Judge Rowland sitting in the Family Court dated 21 February 2019. It is clearly recorded that the Court made a finding that the prime motivation for the Appellant in making his application was in relation to his immigration application.

18. In the bundle for the Tribunal at page 100 of 110 the CAFCASS officer (I have anonymised the names of the child and the Appellant), "*…My recommendations were that letters should be sent to [the child]. It appears that instead of letters one some occasions [the Appellant] has chosen to send gifts instead. I do not believe that sending gifts alone would have assisted [the child] in beginning to identify her father. Instead, as evidenced within the direct work, [the child] has failed or chosen not to relate to these gifts to her father. I do believe for this*

reason that the intended outcome of the indirect contact has failed somewhat to support the preparation for [the child] for directly spending time with her father".

19. In my judgment there is no material error of law in the Judge's decision. The Judge had cited the correct case law. I note the reference to 'unusual' in the decision in **JA** when there is indirect contact. I also note the important references by Lady Justice King to 'the need to look carefully' at the reasons why only an indirect contact final order had been made. In my judgment, the Judge had done so. He had also referred to the correct Immigration Rules. He had applied the correct standard of proof.

20. The Judge noted with care what the facts of the case were, both in respect of the facts from the Family Court and from the orders of that Court, but also in respect of the matters before him.

21. The Judge also noted that there were several aspects of the case which led him to conclude that on the facts of this case why he was not able to conclude that indirect contact was sufficient to enable the appeal to be allowed.

22. The Judge concluded that there was no genuine and subsisting relationship. He did so following the case law and correct facts as found by him. There is no sufficient basis to go behind those findings.

23. These facts included that even the indirect contact recommended by the CAFCASS officer had not been properly been taken up by the Appellant. There was an important reason why letters were necessary to enable the child to be re-introduced to her father, yet the Appellant sent presents which had little value in that regard. It was also noted that the order of HHJ Rowland was a final order, not an interim order with other hearings to follow. I am aware and made the parties aware that there are sometimes cases in which the family courts order interim indirect contact to then monitor the situation with a view to moving onto direct contact. That was not the purpose of the final order made by HHJ Rowland though. Indeed, the learned Judge had made a specific finding that the Appellant's motivation in the family proceedings was to assist him in his immigration application. Therefore, FTT Judge Sills was bound to have that in mind when making his decision in this case.

24. I see no basis for concluding that just because the Appellant's relationship with his sister was one in which she was married to the Appellant's former former's wife's brother is any way sufficient to find a material error of law. Either the Appellant decides to take up the option of indirect contact via e-mail and letters or he does not. He cannot use the excuse of not being able to use his sister as a reason not to take up the indirect contact. It is just as easy to send an e-mail from Pakistan as it is within the UK. Similarly, although it might take letters a little longer to reach the UK, they can easily be sent by the Appellant to the UK.

There is no reason why he cannot send the letters directly to his former wife for his daughter. The family court order makes it clear that the child's mother must read those letters to the child. I note that HHJ Rowland had made several orders over some two years in respect of the family case. He obviously had very good knowledge of the Appellant. HHJ Rowland's findings and reasons had to be given the weight that they required. Including that the learned Judge was of the view that the Appellant's motivation for the application in the family court was because of his immigration application seeking leave to remain in the UK. The Judge cannot be criticised for taking into account HHJ Rowland's findings.

25. Similarly, I conclude that the video contact or Skype contact can just as easily take place from Pakistan as it can within the UK.

26. The argument that the Appellant intends to apply in 2020 for direct contact is not something which enabled the Judge to conclude that the appeal should be allowed with those future events in mind. I see no basis for why or how the Judge could have 'used a crystal ball' to predict what this Appellant may do in the future, especially against a background of adverse findings by the family court about the Appellant's motivation for making his applications and in view of the Appellant's failure to even abide by the simple requirement to send letters to his daughter.

27. The Judge had carefully considered the arguments in respect of Article 8 and he was perfectly entitled to conclude that because the Appellant had been in the UK lawfully for just 2 out of his 15 years then that was a relevant matter. The Judge was also entitled to conclude that reintegration was not a difficulty of sufficient magnitude in view of the Appellant's age and lack of integration in the UK. Indeed I note that there was little evidence from the Appellant as to why he could not re-integrate in Pakistan.

28. As for the matter of making any further applications for a Contact Arrangements Order to his child, in my judgment, it was open to the Judge to make the decision that he did on the application before him. It was not for the Judge to try to assess what might happen in the future, if the Appellant might decide to comply with the recommendation of the CAFCASS officer on future occasions

29. Having reflected carefully on the case and despite the helpful submissions of Mr Rashid who has so eloquently said everything that can be said on behalf of the Appellant, I conclude that there is no material error of law in the Judge's decision. For me to conclude otherwise would mean me merely disagreeing with the Judge's decision. The Judge's decision was one which he was perfectly entitled to reach.

NOTICE OF DECISION

There is no error of law in the decision of the First-tier Tribunal decision.

That decision dismissing the appeal stands.

Signed: A Mahmood Date: 01 10 2019

Deputy Upper Tribunal Judge Mahmood