IAC-AH-DN-V2

Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/20291/2019**

THE IMMIGRATION ACTS

Heard via Skype for Business at Field House	**Decision & Reasons Promulgated**
On 16 February 2021	**On 04 March 2021**

Before

UPPER TRIBUNAL JUDGE ALLEN

Between

KAMRAN KHAN
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr L Singh of Shams Williams Solicitors
For the Respondent: Mr T Melvin, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a national of Pakistan. He appealed to a Judge of the First-tier Tribunal against the respondent's decision of 25 November 2019 refusing an application for leave to remain made on the basis of family life with his partner.

2. The appellant entered the United Kingdom on 3 January 2017 on a Tier 4 visa, with leave to remain as a student until 19 September 2019. On 18

September 2019 he made the application, the refusal of which was the subject of the appeal before the judge.

3. The appellant and his sponsor, Mrs Bibi, had a nikah ceremony on 6 September 2019 and civil marriage on 1 October 2019.

4. Mrs Bibi has two children by a previous marriage. Her first husband died on 10 September 2006. The children were born respectively on 9 March 2002 and 20 October 2003. Mrs Bibi had come to the United Kingdom in 2001. She had gone back to Pakistan in 2017 to 2018 with the children.

5. The respondent did not accept that the marriage was genuine and subsisting. The judge considered the evidence carefully and accepted that there was uncontroverted evidence that the appellant and the sponsor had married legally and religiously, there was evidence before her that they cohabited and they had begun to share financial commitments. She observed that she had little supporting evidence as to the appellant's relationship with the sponsor's children. In that regard she also referred, at paragraph 63, to the fact that though the appellant acted as stepfather to the children his level of parenting to those children, especially bearing in mind their ages of 16 and 17 at the time of the hearing, was not clearly identified in the evidence. She said that they were independent for most purposes and they had only lived as a family with the appellant from September 2019. The hearing took place on 17 February 2020. The judge made the point that there was no information from the children's school about the appellant's involvement with the children. Subsequently at paragraph 50 she noted that the children were British, the sponsor had sole legal responsibility for them, and they had always lived with their mother and that would promote their best interests. She remarked that the children were rapidly approaching adulthood and might soon be making their own decision as to where they were located or relocated. They were qualifying children for the purposes of the proportionality assessment and should not be expected to relocate unless it was reasonable to expect them to do so.

6. The judge went on to say that the sponsor had a choice as to whether she wished to remain in the United Kingdom or relocate on a permanent or temporary basis to Pakistan. She had already spent time in Pakistan on a temporary basis and had family there. The judge remarked that it was highly likely that for the next couple of years the sponsor's children would remain with her, wherever she chose to live. The decision to leave the United Kingdom and for what period would be one for her. It would not be unreasonable for her to go to Pakistan or for the children to join her there considering her familiarity with that country and her support there. The judge went on to say that whilst the best interests of the children were a primary consideration, their relationship with the appellant was a brief one and noting their ages they were unlikely to be looking for significant emotional support from the appellant. The judge was not satisfied that the appellant's removal to Pakistan would greatly impact on the sponsor's

children or lead to unjustifiably harsh consequences for them. Earlier the judge had referred to the fact that though the appellant was not the children's biological father this did not prevent him from having a parental relationship with them, quoting the decision of the Upper Tribunal in RK [2016] UKUT 00031. The appellant had said in his application form that he helped the children with their homework. He had not placed any supporting evidence before the judge about their relationship and the judge noted that the relationship only really began in September 2019. She went on to identify the test of whether a person who was not a biological parent was in a "parental relationship" with a child for the purposes of section 117B(6) of the Nationality, Immigration and Asylum Act 2002 depended on the individual's circumstances and whether the role that individual played established that he or she had "stepped into the shoes" of a parent. The judge also considered SR [2018] UKUT 00334 where it was 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.

7. In determining her proportionality assessment the judge concluded that the public interest in maintaining an effective system of immigration control outweighed the Article 8 rights of the appellant and the sponsor. She said that there was little evidence that the appellant had a significant private life and his family life had been cultivated at a time when his status in the UK was precarious. He did not meet the requirements of the Rules and there was little to persuade her that the respondent's decision would have unduly harsh consequences. Clearly this refusal might lead to a separation but as a natural consequence of that decision, that in itself was not exceptional or unusual. The appeal was accordingly dismissed.

8. The appellant sought and was granted permission to appeal to the Upper Tribunal on the basis first that the judge had not said whether on the evidence before her she accepted or rejected the claim that the appellant had a genuine and subsisting parental relationship with the children and secondly, in concluding that she was not satisfied that the appellant's removal to Pakistan would greatly impact on the children or lead to unjustifiably harsh consequences for them, she had not answered the question whether it would be reasonable to expect the children to leave the United Kingdom. Permission to appeal was limited to those matters and their impact on the judge's assessment of proportionality.

9. The respondent put in two separate Rule 24 responses, in both of which it was argued that the judge had not erred in law and that the decision should be maintained.

10. In his submissions Mr Singh relied on what had been said by the Upper Tribunal Judge who granted permission. He also placed reliance on the grounds. There were witness statements from the appellant and his

partner. The appellant had confirmed that he shared responsibility for the children after their father had died and the sponsor had also said this. The judge had said there was no supporting evidence placed before her about the appellant's relationship with the children. She had set out the tests but had not carried out the necessary investigation required as set out in SR.

11. As regards the reasonableness of relocation for the children, the judge had set out the test and noted that they were qualifying children but did not set out what the assessment was to make it reasonable for the children to join the appellant in Pakistan. She did not say whether it would be unduly harsh. The children had both been born and brought up in the United Kingdom. The fact of their visit to Pakistan in 2016 did not justify permanent relocation. The judge had not referred to section 55 and the need to consider and take into account the best interests of the children.

12. In his submissions Mr Melvin relied on the two Rule 24 responses. As the judge had identified, the relationship between the appellant and the children was very short in nature. He had only been living at their house for a short number of months at the time of the hearing. The judge had noted the ages of the children and the fact that they were near adulthood and increasingly independent. She observed at paragraph 47 that there was no supporting evidence about the relationship, including no written statement from either of the children. The judge had correctly directed herself with regard to the guidance in RK and SR. Her finding could only be read one way. It was implicit that the appellant was found not to have discharged the burden of proof that he was in a subsisting parental relationship with the children given the reference to a lack of evidence to support such a finding. It was necessary to find that there was a subsisting relationship and that it was not reasonable to expect the children to leave the United Kingdom, in the test under section 117B(6). There were ample references by the judge to conclude as she did about the reasonableness of the whole family relocating to Pakistan. It was a matter for evidence to be put in and there was little about reasonableness. The judge had acted lawfully in her findings. Her decision should be upheld.

13. By way of reply Mr Singh relied on his original submissions. He argued that there was a parental responsibility and there was the issue concerning the reasonableness of the children moving to Pakistan. The judge had not applied the case law properly and that was necessary for the decision to be upheld.

14. I reserved my decision.

15. In essence the challenge to the judge's decision, on the basis of the grant of permission, comes down to whether or not the judge erred in law in her application of paragraph 117B(6) of the Nationality, Immigration and Asylum Act 2002, which states as follows:

> "(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."

16. It is clear that these are cumulative requirements. As a consequence, if a person does not satisfy the requirement in section 117B(6)(a), then the element in (b) is essentially redundant.

17. As noted above, the judge quoted the relevant guidance from RK and SR as regards the tests for a parental relationship for the purposes of the subsection. The judge observed at paragraph 36 of her decision that she had little supporting evidence as to the appellant's relationship with the sponsor's children. In his witness statement the appellant said at paragraph 11 that after getting to know each other as a couple and as a family with his now stepchildren they happily agreed to marry each other with their children and the families' blessing. He went on to refer to the fact that he had established a family life together in the UK with his spouse and stepchildren and he was the only father figure in their life as their biological father had passed away.

18. Essentially the same points were made in essentially the same wording in the witness statement of Mrs Bibi.

19. The judge was, in my view, entitled to say that she had little supporting evidence as to the appellant's relationship with the sponsor's children. It is not without relevance to note that there was no evidence from the children themselves.

20. The judge went on to say that whilst the appellant acted as a stepfather to his 16 and 17 year old stepdaughters, his level of parenting to those children, especially noting their ages, was not clearly identified in the evidence. They were independent for most purposes and had only lived as a family with the appellant from September 2019. There was no information from the children's school about the appellant's involvement with them. She also said, at paragraph 47, having set out the test in RK, that the appellant had said in his application form that he helped the children with their homework. She said that he had not placed any supporting evidence before her about their relationship which had only really begun in September 2019. She noted the absence of any photographs or any other evidence of the family enjoying activities together.

21. It is argued on behalf of the respondent that what the judge found could only be read as an implicit finding that the appellant had not discharged the burden of proof in establishing that he was in a genuine and subsisting parental relationship with the children, bearing in mind the express reference twice to a lack of evidence to support such a finding.

22. Not without some hesitation, I have concluded that on balance the arguments of the appellant are to be preferred in this regard. The judge was required to make a clear finding in this regard and although what she said came close to doing so, she did not, as was noted in the grant of permission, state whether she accepted or rejected the claim that the appellant had a genuine and subsisting parental relationship with the children. As a consequence I find that the judge erred in law in that element of her evaluation of the claim.
23. I also consider that she erred with regard to the issue whether or not it would be reasonable to expect the children to leave the United Kingdom. The judge referred to the correct test at the end of paragraph 50, but her conclusion at the end of paragraph 51 that she was not satisfied that the appellant's removal to Pakistan would greatly impact on the sponsor's children or lead to unjustifiably harsh consequences to them did not apply the correct test. Though she was aware of the fact that the children were British citizens and had been born and brought up in the United Kingdom, there was no assessment of the reasonableness of expecting the children to leave the United Kingdom. Certainly earlier in the paragraph the judge said that, considering the sponsor's familiarity with Pakistan and the support within that country it would not be unreasonable for her to live there or for her children to join her in Pakistan, but that was essentially the context of reasonableness in regard to the sponsor, and failed to give the appropriate consideration to the interests of the children as a separate entity.

24. As a consequence I consider that the errors of law contended for in this case are made out. The degree of re-assessment of the claim that will have to be made is such that it will have to be done in the First-tier Tribunal. The judge's finding at paragraph 36 that the marriage is genuine and subsisting is preserved.

Notice of Decision

The appeal is allowed to the extent set out above.

No anonymity direction is made.

Signed Date 3 March 2021

Upper Tribunal Judge Allen