



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: HU/18614/2016

THE IMMIGRATION ACTS

**Heard at Field House
On 4th September 2016**

**Decision & Reasons
Promulgated On 9th
October 2018**

Before

UPPER TRIBUNAL JUDGE KOPIECZEK

Between

**IH
(ANONYMITY DIRECTION MADE)**

and

Appellant

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A Gilbert, Counsel instructed by Rahman & Company
Solicitors

For the Respondent: Mr T Melvin, Senior Home Office Presenting Officer

DECISION AND REASONS

1. I make an anonymity direction in the light of the fact that there are minor children concerned in these proceedings.
2. On 29 July 2015 the appellant made a human rights application for leave to remain on the basis of family life with his wife, EH, and his stepdaughter, A, who is a British citizen. The appellant is also the father of a child AH who was born on 31 October 2016, thus after the respondent's

decision. That decision is dated 21 July 2016, and which refused the application for leave to remain on human rights grounds.

3. The appellant appealed to the First-tier Tribunal and his appeal came before First-tier Tribunal Judge Watson at a hearing in Birmingham on 3 August 2017, whereby the appeal was dismissed.

Judge Watson's decision

4. I summarise Judge Watson's decision. She summarised the respective parties' cases and identified and summarised in detail the evidence that she had before her, including the oral evidence both of the appellant and of his wife. She set out the relevant legal framework in terms of the Immigration Rules as well as the provisions of section 117A-B of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act"). She set out a detailed chronology of events at paragraph 23 of her decision.
5. She made the following findings which again I summarise. She found that the appellant and his wife EH are second cousins who met in childhood in Pakistan. Their family arranged the marriage after EH's second marriage broke down and discussions took place in December 2014 about such a marriage. All parties were fully aware at that stage that the appellant had no lawful stay in the UK and that his visa had expired.
6. She found that EH's divorce was finalised in January 2015 and that at this point the main purpose of the proposed marriage was "to assist the appellant's immigration issues". She concluded that the appellant and EH did not live together at that time.
7. She said at para 36 that the appellant had produced no evidence regarding an Islamic ceremony save for his and EH's oral evidence and she concluded on a balance of probabilities that the appellant had not started to live with EH from February 2015 as claimed. She referred to inconsistency in the evidence about when they had started living together. She noted that there were several bills in the sole name of the appellant relating to the beginning of 2015 and it was clear that EH was claiming single person tax credits up until 2017 and a single person council tax discount up until sometime in the tax year to April 2016. She said that that was not consistent with the claimed commencement of their living together at the beginning of 2015.
8. At para 37 she said that the chronology showed that the appellant was arrested for immigration offences in July 2015 and that he married EH after his arrest and after his application for leave was refused. She concluded that the marriage was entered into for immigration purposes and that both parties were fully aware of his unlawful status. She said that the discussions between the families prior to the registry office wedding were in the full knowledge of the appellant's unlawful status and that this was part of the motivation in arranging the marriage. She noted that the appellant was released from detention in November 2015 and that since

that time the couple had lived together “for some periods” and the appellant’s main address is with EH.

9. She noted a court order dated 8 April 2016 referring to there being no safeguarding issues with regard to the appellant and she said that that was consistent with their living together as husband and wife at around that time. She accepted that they have a child together, AH, which supported the contention that they were in a genuine relationship. Whatever the motivation for the marriage initially, Judge Watson said she accepted that there was now a husband and wife relationship. It was asserted at the hearing that EH was pregnant but at that time there was no evidence to support that aspect of the claim.
10. As to the appellant’s relationship with A, she found that on a balance of probabilities the appellant had been “based” with his wife and her daughter A from the end of 2015. She also accepted that A’s father had not exercised contact rights in relation to her from the date of the last court order (8 April 2016) and that he had had sporadic and infrequent contact between the two court orders (September 2015 to April 2016). On a balance of probabilities she concluded that the appellant had lived in the same household as A and his wife for around 18 months, that being consistent with the information in the court orders.
11. She then concluded that:

“The appellant does not have parental responsibility for [A] and I have noted that when [EH] went to Pakistan for 5-6 weeks that [A] stayed with her aunt and was not cared for by the appellant. I find on the balance of probabilities that the appellant’s relationship with [A] is not particularly close and his role does not equate to that of a genuine and subsisting parental relationship. The fact that [A] stayed with an Aunt when her mother was away is not supportive of a parental relationship with the appellant”.
12. She then went on to examine the issue of the welfare of A. She found that A was a British citizen and had been in the UK since 2010 although was born in Pakistan and speaks Urdu and English. She had spent the first four years of her life in Pakistan. She concluded that A’s birth father had been inconsistent in his interest in her and had not had contact for a year. She said that A does not have a particularly close relationship with the appellant at present, and had no special needs. She said that if her mother wished to go to Pakistan her mother would have to apply to the court for permission to do this or obtain the permission of her ex-husband. She referred to the decision in *Secretary of State for the Home Department v GD (Ghana)* [2017] EWCA Civ 1126 in terms of the relationship between a child who is subject to a Family Court order and that child leaving the United Kingdom.
13. At para 41 she found that her best interests were met by being with her mother who is her main carer. She said that that could be in Pakistan if permission is granted by the Family Court or in the UK. She then

concluded that she did not find “that the appellant’s presence is necessary for [A’s] welfare or that her welfare would be harmed in particular by the appellant’s removal”.

14. In relation to AH (the appellant’s son), Judge Watson said as follows at para 42:

“[AH] is under a year old and his welfare is served by being looked after by his mother. On the balance of probabilities it would be in his best interests to know his father as he grows up. This can be through living with both his parents, or his mother ensuring that he has full knowledge of his father with visits and contact”.

15. She then went on to consider paragraph 276ADE(vi). She concluded that there were no significant obstacles to the appellant’s return to Pakistan, concluding that he has strong ties there and family there that could assist him. She also noted that the appellant’s wife gave evidence that she also had family members in Pakistan and the appellant had confirmed that his parents live there. She noted that the appellant’s father was a retired solicitor and the family live in the family home and that that was where the appellant’s wife stayed on her visit to Pakistan recently.
16. Other findings were as follows. She reiterated that the appellant’s relationship with his wife was in the full knowledge that he only had temporary leave in the UK and that she was fully aware of his status when they entered into the relationship. She concluded that the couple were aware that the appellant had no right to stay on a long term basis in the UK before their child was conceived, that child presumably being AH.
17. She found that the appellant could not meet the Immigration Rules as a parent as EX.1 under the Rules does not apply to a joint carer. She noted that AH is a Pakistani national and not a qualifying child in any event, and the appellant’s relationship with A was not equivalent to a genuine and subsisting relationship regardless of the lack of input from A’s birth father. Thus, she concluded that the Rules could not be satisfied either as a partner or as a parent.
18. She then went on to make an assessment of the factors under s.117 of the 2002 Act. She gave little weight to the relationship between the appellant and his wife because of his unlawful stay. She referred to his precarious stay for the years 19 June 2010 to 9 April 2012 when he had been living here without leave after that time. She said that he does not speak fluent English and that that was a matter that also weighed against him. She found that he had some unspecified resources in his accounts. He had not however, shown that he can be self-sufficient and EH specifically referred to borrowing to discharge debts. Again, she found that that was a matter that weighed against the appellant in the balancing exercise.
19. At para 48 she concluded that the appellant has some relationship with A. His lack of knowledge of contact with her father however, and the history of the father’s offending and release from prison, and his vague

knowledge of her education and interests indicated that it was not at the stage where it could be categorised as a genuine and subsisting parental relationship. She noted again that A was not looked after by him when her mother went to Pakistan. But in any event, she said even if she was wrong about that she found that it would be reasonable to expect A to leave the UK. Both her parents are of Pakistani heritage as is the appellant and her half-brother is Pakistani. Her welfare, whilst a primary concern, can be looked after abroad by her mother if she chose to leave the UK and her interests would not be damaged by a move such that it could not or should not be contemplated.

20. She noted that there was a current prohibition on her removal and that the Family Court would have to be consulted. She concluded that there was no information before her that indicated that the child has an ongoing significant relationship with her birth father such that her welfare would be damaged by a move.
21. In her concluding paragraph in terms of assessment of the factual matters, Judge Watson noted that the appellant had been in the UK since 2010 as a student. She referred again to the status that he had when he entered into his relationship. She found that the appellant could leave the UK and that his wife could visit Pakistan and they could communicate in that way through Skype and other means. She noted that the appellant's wife had recently visited Pakistan and had good and recent contacts with family there. Alternatively, she could consider a move to Pakistan before her current leave expired in 2018. At the time of the hearing before Judge Watson the appellant's wife had leave until 14 June 2018. She said that a request could be made for permission for A to move as well. She also said that the appellant's wife could make alternative arrangements for A who appears to be close to her aunt if she feels that such would be in A's interests. Furthermore, the appellant could make an application to enter under the Rules if he is in a position to do so.
22. She went on as follows:

"I find it disproportionate (sic) for the appellant who has flouted immigration rules and in the full knowledge of his partner to be in an advantageous position when compared with others who comply with rules. The couple have some difficult decisions to make but they have entered into their current situation in full knowledge of all the facts, and the situation is entirely of their own making".

She then said that the decision to refuse leave was proportionate in all the circumstances and that immigration control was in the public interest. She said that "I do not find it disproportionate that the appellant should comply with immigration rules, particularly considering his very poor immigration history".

Grounds and Submissions

23. The grounds of appeal in relation to Judge Watson's decision contend that she erred in relation to the assessment of A's best interests. *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4 is relied on. The grounds also contend that there was an inadequate assessment of AH's best interests. Those matters constitute ground 1.
24. Ground 2 makes complaint about the assessment of the extent of the appellant's relationship with A, arguing that that assessment is not sustainable on the evidence. It is said that no reasons, or no adequate reasons, were given and the grounds assert that Judge Watson's conclusions appear to have been heavily influenced by the fact that A stayed with an aunt rather than the appellant when her mother was in Pakistan for six weeks. Evidence is referred to which it is said Judge Watson failed to take into account, including witness statements from the appellant and his wife.
25. Lastly, in relation to ground 3 it is said that there was a misapplication of the *Razgar* test, in particular in terms of proportionality and in one particular respect her decision was not clear. I shall refer to this in more detail below.
26. In his submissions Mr Gilbert relied on the grounds. It was submitted that there was no evidence in relation to what would happen if the appellant left the UK leaving A in the UK. Her welfare was a relevant consideration and it was not a question of whether she would be harmed, which is what Judge Watson appeared to have said when she considered the proportionality of the decision. It was argued that Judge Watson had imposed a test of "damage" in terms of best interests but damage was not determinative of that question.
27. Reference was made to aspects of Judge Watson's decision in relation to the assessment of AH's best interests. The express or implied suggestion that contact could be maintained at a distance was inconsistent with accepted jurisprudence.
28. In terms of the relationship between the appellant and A, it was submitted that there was inadequate reasoning. I was referred in detail to the witness statements of the appellant and his partner contained in the bundle of documents before the First-tier Tribunal at pages 2-5, in particular paragraphs 13-15 and reflected in paragraphs 11-13 of EH's witness statement. I was also referred to a letter from the GP's practice as to the appellant being registered as the father of A. Although Judge Watson had said at para 34 that evidence in relation to what the appellant knew about A's schooling was vague, she did not in fact give that as a reason for concluding that there was a lack of parental relationship. Mr Gilbert pointed out that it was also found that his wife's evidence in that respect was likewise vague and it was submitted that it could not be suggested that that in any way affected *her* credibility on the matter.

29. The conclusion that it was significant that A chose to stay with an aunt whilst her mother was in Pakistan failed to take into account the evidence to the effect that there were other children at the aunt's house which was the reason given for that prolonged stay. Thus, it was argued that Judge Watson did not take into account all the evidence.
30. In relation to ground 3, it was submitted that the decision was unclear and Mr Gilbert sought to make sense of what the judge had said in terms of her use of the expression "disproportionate" in relation to the appellant's actions.
31. Mr Melvin relied on a 'rule 24' response which, to summarise, refutes the contentions advanced in the grounds on behalf of the appellant. It was submitted that the relationship between the appellant and A was a matter for the judge to decide and her conclusions were open to her. Taking a child to school or to the mosque does not show a parental relationship. It was submitted that it was open to Judge Watson to find that the best interests of the children were to remain with their mother.
32. It was submitted that ground 2 was simply a disagreement with the judge's conclusion in terms of the relationship between A and the appellant and Judge Watson was entitled to find it significant that there was a six week period when she stayed with an aunt rather than with the appellant. The doctor's letter does not take the matter further because the appellant is not in fact the biological father of A.
33. Mr Melvin also submitted that the issue was not of credibility as such but of an assessment of the children's best interests and the evidence of the relationship in order to determine whether there was a relationship.
34. Mr Gilbert in reply said that credibility was relevant and there was no finding of incredibility in relation to the evidence either of the appellant or of his wife. Furthermore, it was not clear whether Judge Watson accepted or rejected the evidence in relation to the appellant's involvement with A, for example in taking her to school.

Assessment and Conclusions

35. I have listened very carefully to the arguments on behalf of both parties and considered the documentary evidence put before me. I am not satisfied that there is any error of law in Judge Watson's decision.
36. The grounds, which I have summarised, raise various issues. At para 5 of the grounds Judge Watson's decision at para 41 is quoted whereby she said that she found that A's best interests are met by being with her mother who is her main carer and that that could be in Pakistan or in the UK. She concluded that the appellant's presence was not necessary for A's welfare and that her welfare would not be harmed in particular by the appellant's removal. I am satisfied that, when taken in the context of the other findings, there is an adequate assessment of A's best interests. It is

to be borne in mind, and this is allied with ground 2, that there was a finding by Judge Watson which I shall come to in a moment with reference to the grounds, that the appellant did not have a genuine and subsisting relationship with A. That was a finding that was relevant to the assessment of her best interests. If the appellant does not have a genuine and subsisting relationship with her, that is significant in terms of her relationship with him and provides context to Judge Watson's decision.

37. I do not accept what is said at para 7 of the grounds to the effect that Judge Watson appeared to have imposed a higher test than was required in stating that the appellant's presence was not "necessary" for A's welfare or in the statement that her welfare would not be "harmed in particular" by his removal. Those aspects of her decision are part of a whole and need to be seen as such. Judge Watson was assessing whether it was necessary for her welfare, that is to say for her best interests, and whether her welfare or best interests would be harmed by the appellant's removal and she was entitled to come to the conclusion that it would not. It was entirely reasonable and legally sustainable for her to conclude that A could be expected, and that it was reasonable to expect her, to leave the UK notwithstanding her British citizenship. She noted that both her parents were of Pakistani heritage and that the appellant and her half-brother were also of Pakistani heritage. She concluded that her welfare can be looked after abroad by her mother, that is the appellant's wife, if she chose to leave the UK and that her interests would not be "damaged" by such a move.
38. I do not accept that Judge Watson imposed a test of "damage" in relation to A's best interests. This aspect of the grounds, in common with other aspects, amounts to the plucking of a phrase here and there, out of context, without considering the judge's overall assessment of best interests. In no respect did Judge Watson impose any higher threshold or test than was legally permissible. The phrases that the judge used were simply a means of describing how the best interests should be assessed and the extent to which those best interests would not be compromised by the appellant's removal or by the other conclusions she came to in terms of either child leaving the UK.
39. It is said at para 13 of the grounds that Judge Watson had failed completely to consider whether it was in AH's best interests for his father to be removed from the UK. I do not accept that contention. At para 42 she noted that his welfare is served by being looked after by his mother and that on a balance of probabilities it would be in his best interests to know his father as he grows up. She said that that can be through living with both his parents or his mother ensuring that he has full knowledge of his father with visits and contact. In other words, what Judge Watson was saying there was that it was in a child's best interests to maintain contact with both parents and that that was the preferred state of affairs. Nothing in her decision at para 42, brief though it is, amounts to any legal error. She assessed AH's best interests in terms of the options that were available.

40. So far as ground 2 is concerned, I am not satisfied that there is any error in Judge Watson's assessment of the appellant's relationship with A. It is to be borne in mind that at para 34 she said that she found that the appellant had given vague details when asked about A's schooling and interests. It is true that she also found that the appellant's wife was also vague about those matters but it was relevant for her to consider the extent to which the appellant knew about A's schooling and interests because it was his relationship with her which was being assessed in this context and her assessment of it which is the subject of the complaint. Whilst she did not expressly advert to that finding (about the appellant's knowledge of A's schooling etc) when she gave her conclusions elsewhere in the decision, it is trite that a judge does not have to refer to every aspect of the evidence in expressing conclusions.
41. She did take into account that the appellant's father had not exercised contact rights with A from 8 April 2016 and insofar para 18 of the grounds suggests that she failed to take that issue into account, it is a complaint that cannot be sustained.
42. So far as the witness statements of the appellant and his wife are concerned, I have already referred to those aspects of the witness statements which are relied on in this respect in terms of Judge Watson's assessment of the relationship with A and the contention that that evidence was not taken into account. Again, it is trite that a judge does not have to refer to each aspect of the evidence. I have already referred to the fact that he gave vague evidence in relation to A's schooling and interests. When one looks at the witness statements in this respect it is pertinent to point out that the witness statements of the appellant and his wife are actually word for word the same with necessary changes as to pronouns. It is true that Judge Watson did not refer to that issue herself but it is a matter that puts into context the contention that there was significant evidence that ought to have been taken into account.
43. It was also pertinent for the judge to note that when A's mother went to Pakistan for five or six weeks (according to the judge's decision or six weeks according to the grounds), she stayed with an aunt and was not cared for by the appellant. According to the evidence there was "some input" from the appellant whilst she was away but in my judgement there is force in the submission made on behalf of the respondent to the effect that one would have expected the child to have stayed with the other parent if that parent had a genuine and subsisting relationship with her. This is a matter that the judge was entitled to consider was adverse to the claim that he had a parental relationship with her.
44. In relation to ground 3, what Judge Watson said at para 49 (not 48 as stated in the grounds), which I have quoted above at my para 22, is a little muddled. To repeat, she said that "I find it *disproportionate* for the appellant who has flouted immigration rules and in the full knowledge of his partner to be in an advantageous position when compared with others who comply with the rules". She went on to state that it was not

disproportionate that the appellant should comply with immigration rules particularly considering his very poor immigration history.

45. One can readily understand the complaint made about that part of her decision. However, I am satisfied that that paragraph as a whole represents a sustainable proportionality assessment. I say that because Judge Watson also said in the same paragraph that the decision to refuse leave was proportionate in all the circumstances Judge Watson evidently recognised that the assessment of proportionality had to be undertaken in the round. I am satisfied that that is what she did, taking into account the appellant's adverse immigration history.
46. In the circumstances, I am not satisfied that the decision of the First-tier Tribunal involved the making of an error on a point of law. The decision to dismiss the appeal therefore stands.

Decision

The decision of the First-tier Tribunal did not involve the making of an error on a point of law. Its decision to dismiss the appeal therefore stands.

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.

Upper Tribunal Judge Kopieczek

1/10/18