Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/20040/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
Heard on 24 April 2018	**On 10 May 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE WOODCRAFT

Between

MR RIZWAN MUHAMMAD SHAUKAT
(Anonymity order not made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr S Mustafa of Counsel
For the Respondent: Ms J Isherwood, Home Office Presenting Officer

DECISION AND REASONS

The Appellant

1. The Appellant is a citizen of Pakistan born on 19 April 1981. His appeal against a decision of the Respondent dated 14 May 2015 to refuse to grant him leave to remain in the United Kingdom was allowed by Judge of the First-tier Tribunal Martins sitting at Hatton Cross on 21 November 2017.

The Respondent appeals with leave against that decision and for the reasons which I have set out below I have set aside the decision of the First-tier Tribunal and have re-made the decision in this appeal. Although the matter came before me initially as an appeal by the Respondent, for the sake of convenience I will continue to refer to the parties as they were known at first instance.

2. The Appellant entered the United Kingdom on 30 January 2014 with entry clearance as a tier 4 (general) dependent valid until 15 September 2015. The Appellant was the spouse of [SK] ("Ms [K]") a citizen of Pakistan born on 8 April 1982 who had applied for leave to enter the United Kingdom. The couple had a child M who was born 1 January 2013 in Pakistan. He was not a British citizen and has not lived in the United Kingdom for at least 7 years. M was born in Pakistan but entered the United Kingdom with the Appellant on 30 January 2014. On 19th of March 2015 the Appellant made his application for further leave to remain the refusal of which has given rise to the present proceedings.

The Explanation for Refusal

3. On 14 May 2015 the Respondent refused the Appellant's application concluding that the Appellant did not fulfil the requirements of Appendix FM in respect of the parent route. The Appellant's child M was not a qualifying child and the Appellant did not have sole parental responsibility for M who lived with his mother Ms [K]. Section EX.1 did not apply to the Appellant as the Appellant failed to meet the eligibility requirements of the Immigration Rules. The Respondent considered the application under paragraph 276ADE (1) but noted that the Appellant had lived in the United Kingdom for one year and could not show that he had lived continuously in the United Kingdom for at least 20 years or half of his life. There were no very significant obstacles to his reintegration back into Pakistan. There were no exceptional circumstances such that the application should be granted outside the rules.

The First Appeal Proceedings

4. The Appellant appealed that decision and the matter came before Judge of the First-tier Tribunal Housego sitting at Hatton Cross on 11 August 2016. He dismissed the appeal finding that the Appellant, M and Ms [K] were all citizens of Pakistan and could be expected to return there. The Appellant appealed against that decision and a material error of law was found by Upper Tribunal Judge Lane sitting at Field House on 3 March 2017.

5. The Appellant was permanently separated from the mother of the child and if all three were to return to Pakistan the Appellant would be required to obtain an order for contact in a Pakistan court if he was to enjoy any family life with M. It was difficult to see how such a scenario might amount to the resumption of family life. The Judge had not determined the extent

of family life between the Appellant and M and had not made any finding that contact was taking place in accordance with the Family Court order dated 23rd of July 2015. The Judge needed to deal in greater detail with the relationship between the Appellant and M and the relevance in the Article 8 analysis of the order which gave the Appellant contact with M each Sunday between 2 PM and 6 PM. Judge Lane noted in remitting the appeal back to the first tier to be reheard that by the time of the next First-tier Tribunal hearing it was likely that a decision would have been taken on Ms [K]'s asylum application. The Appellant needed to provide evidence to show that he was complying with the contact order.

The Proceedings under Appeal

6. In consequence of that decision the matter came before Judge of the First-tier Tribunal Martins sitting at Hatton Cross on 21 November 2017. She heard evidence from the Appellant and found him to be a credible witness. The Appellant and Ms [K] did not have the best of communication but had some in relation to M. The order of the East London Family Court provided that M was not to be removed from the United Kingdom without the consent of either of M's parents or the consent of the court. The Appellant and M were close and the Judge was satisfied that they did spend at least Sunday afternoons together as envisaged by the contact order. When M was ill Ms [K] would contact the Appellant, who would go and spend time with M.

7. When the matter came before Judge Martins Ms [K]'s asylum claim had still not been determined by the Upper Tribunal. Her application for asylum had been refused by the Respondent and she had appealed to the First-tier Tribunal. On 25 September 2017 the First-tier Tribunal had dismissed Ms [K]'s appeal. Ms [K] applied for permission to appeal which was refused by the First-tier on 18th of October 2017. Her onward appeal to the Upper Tribunal for permission to appeal was refused on 22 November 2017, the day after the hearing before Judge Martins. She did not promulgate her determination until 31 January 2018, just over 2 months after Ms [K]'s application to the Upper Tribunal was refused.

8. In argument before Judge Martins it was said that the Appellant was an educated man who spoke English, held a full-time position and had done so for the past four years which had earned him more than the money that would be required for a couple under the Immigration Rules. He had not committed any criminal offences. At [26] of the determination Judge Martins came to the conclusion that the Appellant had discharged the burden upon him of showing that the Respondent's decision to refuse to grant further leave to remain was a disproportionate interference with the Appellant's right to a private and family life under Article 8, the Appellant having accepted that he could not meet the Immigration Rules.

9. The Judge noted at [27], in the light of the authority of **MH [2010] UKUT 439** that it was the practice where there were family proceedings for an immigration appeal to be allowed pursuant to Article 8 rather than for the proceedings to remain within the Tribunal system to be adjourned perhaps more than once. The Respondent would normally grant a short period of discretionary leave bearing in mind any relevant facts found by an immigration Judge.

The Onward Appeal

10. The Respondent appealed against that decision arguing that the First-tier had failed to take into account that M was not a qualifying child. Ms [K] had been served with form IS 96 indicating an intention to remove her. The First-tier had speculated about whether the Appellant would be able to maintain contact with M in Pakistan when there was no evidence of the Family Court or other systems in Pakistan. M had no status in this country and may well be liable to removal with Ms [K] when her appeal concluded.

11. The application for permission to appeal came on the papers before Judge Boyes on 28 February 2018. In granting permission to appeal he wrote that it was arguable that the Judge had erred in reaching the decision to allow the appeal in light of the fact that M was not British had no status in the United Kingdom and was likely to be removed from the United Kingdom with Ms [K].

The Hearing Before Me

12. In consequence of the grant of permission to appeal the matter came before me to consider in the first place whether there was a material error of law such that the determination fell to be set aside. If there was then the decision would be remade. If there was not then the decision at first instance would stand.

13. For the Respondent the Presenting Officer argued that the Judge had looked at the case on a mistaken basis and misapplied the authority of **MH** regarding pending family proceedings. The Respondent would normally grant a short period of discretionary leave where there were current court proceedings in the Family Court but it was for the Respondent to decide on the period of leave in each case. If the application for a contact order was successful a parent may apply for further leave to remain in the United Kingdom. The result of the failure of Ms [K]'s asylum appeal was that the Appellant was only still here because he had an appeal in the system. **MH** did not apply in this case. In **MH** the child was a British citizen and had a British citizen mother. That was not the factual matrix in this case.

14. There was no background evidence to show what would happen if Ms [K] and M returned to Pakistan. In a deportation appeal, **Mohammed [2014] UKUT 419**, the Upper Tribunal had said there was nothing to support the

notion that the merest possibility of an application for contact being made or pursued was a relevant criterion in the case of an immigration appeal when deciding whether to adjourn an appeal or to direct a grant of discretionary leave in order for such proceedings to be pursued. The relevant guidance was concerned with whether there was a realistic prospect of the Family Court making a decision that would have a material impact on the relationship between a child and the parent facing immigration measures such as deportation. In this case none of the parties had the right to stay in the United Kingdom. The Judge had not appreciated the facts or the case law. Section 117B (6) of the Nationality Immigration and Asylum Act 2002 was not relevant in this case because M was not a qualifying child and it was reasonable to expect M to leave the United Kingdom.

15. For the Appellant counsel noted that the appeal had been allowed outside the Immigration Rules. The contact order made by the East London Family Court provided that it was a criminal offence to remove M from the jurisdiction. The best interests of M needed to be considered. The decision under Article 8 made by the Judge was correct.

The Decision on Error of Law

16. There were two main reasons for the remittal by Judge Lane from the Upper Tribunal to the First-tier. The first was the uncertainty surrounding the asylum appeal of Ms [K]. If she were successful in that appeal she would remain in the United Kingdom and M would remain here as well. If M remained here then the Appellant could only exercise his rights under the contact order by remaining in this country. The second reason was that Judge Housego had given an insufficient analysis of the circumstances of the family.

17. The difficulty with Judge Martins' decision was that she was unaware when her determination was promulgated that Ms [K] had been ultimately unsuccessful in her asylum appeal and therefore had no right to remain in this country just as M had no right to be here. She indicated at [25] that the Appellant met the criteria under section 117B of the 2002 Act. It is not clear from her determination whether she was only considering the sub-sections which relate to financial independence and linguistic ability or whether she was suggesting that the public interest did not require the Appellant's removal because the Appellant had a genuine and subsisting parental relationship with M and it would not be reasonable to expect M to leave the United Kingdom (sub-section (6). On the facts of this case that sub-section could not be apply to the Appellant.

18. The main reason why Judge Martins found that M could not leave the United Kingdom was because of the existence of the contact order made by the East London Family Court. That however was an order made inter partes and its effect on the immigration status of the three persons

involved was not sufficiently analysed. I find that there were material errors of law in the First-tier decisions such that it falls to be set aside and the decision remade. I considered at the hearing whether the matter needed to be remitted back to the First-tier again or whether I could re-decide the appeal. I do not consider that it is necessary to remit given the relatively narrow issue in this case, which turns on the status of the injunction attached to the East London Family Court order. I therefore proceed on the basis of the facts as found by the Judge save where the Judge was unaware of the factual position which has now been made clear.

Findings

19. It is accepted in this case that the Appellant cannot meet the Immigration Rules and therefore the matter must be determined outside the rules under Article 8. The best interests of M are a primary consideration of this Tribunal and must be considered first. Undoubtedly M's best interests are to remain in the care of his mother and to enjoy regular contact with his father who has a genuine and subsisting relationship with M. As Judge Martins pointed out the Appellant and M have a family life which would be interfered with by requiring the Appellant to leave the United Kingdom if M were to remain in this country.

20. It is less clear whether the family life enjoyed by the Appellant and M would be interfered with if they (and Ms [K]) were removed to Pakistan. There was no evidence before Judge Martins at first instance on the possibility of contact being ordered by a court in Pakistan and there was no evidence on this point before me. As the burden of proof was on the Appellant to establish his case, I cannot see that there would be difficulties for the Appellant to have contact with his son in Pakistan.

21. The Appellant's evidence to Judge Martins is summarised at [18] of her determination. The Appellant said he did not believe that on return to Pakistan he would be able to see M because he and Ms [K] did not see each other. That is not a sufficient reason to say that contact would not therefore take place. There is no evidence in this case that it is harder for a father to see his child in Pakistan than it is for a father to see his child in the United Kingdom. If the Appellant was able to obtain an order to see his son in the United Kingdom I see no reason why the Appellant could not do something similar in Pakistan, should it be needed.

22. The position would then be that the three individuals in this case, none of whom have a right to be here, would all be in Pakistan and would be able to enjoy their family relationships there. In this way the best interests of M would be safeguarded. Even if there is any interference in the family life between M and the Appellant perhaps caused by any potential disruption to the contact arrangements whilst the parties are being removed to

Pakistan, that could be remedied upon return to Pakistan when the Appellant could resume contact with M.

23. The main point made by the Appellant is that it would not be possible to remove Ms [K] and M because there is a court order prohibiting the removal of M from the jurisdiction. There are a number of difficulties with this argument. The first is that the fact that Ms [K] was unsuccessful in her appeal indicates that both the First-tier Tribunal and the Upper Tribunal took the view that Ms [K]'s Article 8 claim (assuming she made one) based on her care of M could not succeed. Even if she did not make such a claim, the order made by the East London Family Court prohibiting the removal of M is directed to the parties in that litigation. It is to prevent one or other of the parents from removing M arbitrarily and thereby frustrating the residence and contact arrangements made under that order. It cannot in my view be an obstacle to the Respondent in his plans to remove the Appellant. If that were not so it would be a simple method to frustrate the will of Parliament and the meaning of the Immigration Rules for two parents neither of whom have the right to be in this country to formulate a claim before a Family Court in order to obtain an order that their child should not be removed. The Child Abduction Act 1984 makes it a criminal offence to remove a child without the leave of the court but that does not apply where the person removing, in this case the Secretary of State, has lawful authority to do so, which he would have under removal direction issued to Ms [K] and M. It would not in those circumstances be necessary for the Respondent to apply to the Family Court for permission to remove M.

24. The Upper Tribunal in the decision of **RS** stated that the Tribunal should be alert to proceedings which are designed more to frustrate immigration procedures than to ensure the best interests of a child. Even taking these contact proceedings at face value and that it was necessary for the Appellant to apply for a contact order to ensure that he saw M regularly, it cannot be correct that the immigration acts can be frustrated by the actions of two parents neither of whom have the right to be here. By engaging in this litigation, they are running up costs to the public purse. There is no reason why this litigation needs to be conducted in the United Kingdom since all three parties are citizens of Pakistan and all three should return to their country of origin. I have seen nothing to indicate that the best interests of M would be prejudiced if litigation was undertaken in Pakistan.

25. Given M's young age his primary focus will be on Ms [K] his mother and there is no reason why he could not adapt to life in Pakistan upon return (where he spent the first year of his life) living with her. Even if there is an interference with family life by returning all three parties to Pakistan, that interference would be proportionate to the legitimate aim being pursued. I do not consider that the order of the East London Family Court makes the removal of the Appellant disproportionate for the reasons given at [24] above.

26. The Appellant has not advanced a case in respect of his private life with any force. That must be right. The Appellant has no status to be in this country and any private life he may have built up here while his status has been at best precarious cannot be given any great weight by the Tribunal in the proportionality exercise. His private life may be interfered with by returning him to Pakistan but that interference is proportionate to the legitimate aim pursued given that the Appellant has overstayed his dependent visa and has only been in this country for a very short period. The Appellant's private life claim has to be looked at through the prism of the Immigration Rules. Due weight must be given on the Respondent's side of the scales due to the fact that the Appellant cannot meet the rules. The interference with the Appellant's private life is therefore proportionate.

27. The Appellant cannot show any reason which engages Article 8 and I remake the decision in this case by dismissing the Appellant's appeal.

Notice of Decision

The decision of the First-tier Tribunal involved the making of an error of law and I have set it aside. I remake the decision by dismissing the Appellant's appeal

Appellant's appeal dismissed

I make no anonymity order as there is no public policy reason for so doing.

Signed this 2 May 2018

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Judge Woodcraft
Deputy Upper Tribunal Judge

TO THE RESPONDENT
FEE AWARD

As I have set aside the decision of the First-tier Tribunal I set aside the fee award. As I have dismissed the appeal there can be no fee award.

Signed this 2 May 2018

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Judge Woodcraft
Deputy Upper Tribunal Judge