Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/09720/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 13 May 2019	**On 21 May 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE NORTON-TAYLOR

Between

D S
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, I make an anonymity order. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the Appellant or members of his/her family. This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings. This direction has been made in order to protect the Appellant's stepson from serious harm, having regard to the interests of justice and the principle of proportionality.

Representation:
For the Appellant: Mr Rai, Counsel, instructed by Direct Access
For the Respondent: Mr Bramble, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is the remaking of the decision in the Appellant's appeal against the Respondent's refusal, dated 8 April 2016, of a human rights claim made on 16 December 2015. By a decision dated 27 January 2019, I found that the First-tier Tribunal had materially erred in law (this decision is annexed, below). In essence, my error of law decision was based upon the inadequate assessment of the Appellant's claimed relationship with his claimed partner K and her son J (the Appellant's claimed stepson).

2. I set the decision of the First-tier Tribunal aside and issued directions to the parties. The matter then came before me on 25 March 2019 for a resumed hearing. Unfortunately, due to administrative issues, the Senior Presenting Officer had not been provided with the relevant file and I decided that it would have been unfair to have proceeded on that occasion. Therefore, I adjourned the appeal and set out in a directions notice what I considered to be the core factual and legal issues in this appeal. In respect of the former, I stated as follows:

> "There are three factual issues:
>
> 1.1 first, the nature of the relationship between the Appellant and his claimed partner;
>
> 1.2 second, the nature of the relationship between the Appellant and his claimed partner's son (his claimed stepson);
>
> 1.3 third, the claimed circumstances relating to the Appellant's familial history in India and any protection issues arising therefrom."

3. In respect of the legal issues, I identified these as being:

> 1.1 first, whether the Appellant can rely on Appendix FM to the Immigration Rules ("the Rules"), with particular reference to EX.1;
>
> 1.2 second, whether the Appellant can rely on section 117B(6) of the Nationality, Immigration and Asylum Act 2002 ("NIAA 2002");
>
> 1.3 third whether the Appellant can rely on claimed problems in India arising before his arrival in the United Kingdom to show that there would be very significant obstacles to his reintegration into Indian society, with reference to paragraph 276ADE(1)(vi) of the Rules."

The Appellant's case in summary

4. As set out in my directions, the Appellant's case concerns two relationships, that with K and the stepson J, together with claimed difficulties arising in his home area

in Punjab, India, which he says would cause him problems if he were to return there now.

The evidence before me

5. In remaking the decision in this appeal I have had regard to the following sources of evidence:

    (1) the original Respondent's bundle under cover of letter dated 29 March 2017;

    (2) the Appellant's First-tier Tribunal bundle, indexed and paginated 1 – 387;

    (3) the Appellant's supplementary bundle prepared for the rehearing of this appeal, indexed and paginated 1 – 27;

    (4) an independent social worker's report by Mr Brian E Smith, dated 18 May 2018; copies of the residence permits for K and J;

    (5) a copy of the First-tier Tribunal's decision in K's appeal, promulgated on 31 January 2017 (PA/07597/2016).

6. The Appellant and K both attended the rehearing and gave oral evidence with the assistance of a Punjabi interpreter. A full note of the oral evidence is contained in the Record of Proceedings. I do not propose to set it out here but will refer to any relevant aspects of it when setting out my findings of fact, below.

Submissions of the parties

7. For the Respondent, Mr Bramble relied on the reasons for refusal letter dated 8 April 2016. He expressly accepted, in light of the evidence as a whole, that the Appellant was in a genuine and subsisting relationship with K and that he had a genuine and subsisting parental relationship with J. Whilst not specifically challenging the credibility of the Appellant's evidence relating to the claimed land dispute in India, Mr Bramble submitted that as matters now stood, it would not cause him any difficulties on return. In respect of the relevant legal issues, Mr Bramble accepted that J, like his mother, is a recognised refugee in this country and that it would be in J's best interests to remain in the United Kingdom. Mr Bramble suggested that K and J would be in a better position in respect of returning to India now that the Appellant would be with them. He suggested that there were no particularly good reasons as to why this family unit could not go and live away from the Punjab. Mr Bramble did accept that J only spoke English and Punjabi.

8. Mr Rai relied on his skeleton argument. He placed significant emphasis on the social worker's report, in particular the matters referenced at paragraph 3 of the skeleton argument. J was clearly well-settled in the United Kingdom and had a strong relationship with the Appellant. Leaving the United Kingdom for India would entail significant disruption to J and his mother. The latter had already experienced very traumatic events whilst in India. Overall, it was submitted that there would be insurmountable obstacles to the Appellant being able to enjoy family life with K in India and/or that it would not be reasonable for J to leave the United Kingdom.

9. At the end of the hearing I reserved my decision.

Findings of fact

10. There was very little, if any, dispute as to the material fact in this case, particularly in light of what I consider to be the entirely fair and realistic position taken by Mr Bramble at the hearing before me.

11. Taken as a whole, the evidence clearly shows that the Appellant is and has been for a number of years now in a genuine and subsisting relationship with K. When combining Mr Bramble's concession as to the existence of the relationship with the evidence contained in the couple's witness statements and the Appellant's bundle, I find that the relationship began at some stage in 2012 or shortly thereafter and I find that the couple began cohabiting in 2014.

12. I find that K is a recognised refugee in the United Kingdom. This is not in dispute. I find that her status resulted from a successful appeal to the First-tier Tribunal in 2017 in which the judge concluded that she had given truthful evidence and was at risk of serious domestic violence at the hands of her ex-husband. I find that the judge also concluded that there would have not have been any state protection and that she could not internally relocate (at least in respect of her circumstances at that point in time). I find that K had suffered from PTSD as a result of her traumatic past experiences.

13. I find that the Appellant does have a subsisting and genuine parental relationship with J, a point fairly conceded by Mr Bramble. The unchallenged expert evidence of the social worker is clear on the nature or the relationship between the two and I place very significant weight upon it. This evidence is to the effect that J sees the Appellant very much a father figure and that the Appellant plays a significant role in the child's day-to-day life. In addition, I find that J was born and brought up in the United Kingdom and is very well-settled in school and in his social environment more generally. I find that J speaks English and Punjabi only.

14. In respect of the Appellant's circumstances in India, I find that his parents do indeed live with his sister approximately 60 kilometres from the family's home village. In view of the evidence before me and the absence of any specific attack on credibility, I

am prepared to accept that there had indeed been some sort of a land dispute at some point in the past.

Conclusions on the Article 8 claim within the context of the Rules

15. The Appellant cannot rely on Appendix FM insofar as his relationship with J is concerned. That is because he lives together with J and K in single family unit and therefore cannot get past E-LTRP.2.3 and 2.4.

16. However, the Appellant is potentially able to rely on EX.1 in respect of his relationship with K. On my findings of fact, K is his "partner" for the purposes of the Appendix, there are no suitability issues. With reference to EX.1, K is a person with leave as a refugee in this country and in my view there are insurmountable obstacles to family life being continued outside of this country. My reasons for this final conclusion are as follows.

17. First, whilst I appreciate Mr Bramble's submission in respect of the Appellant being with K and potentially accompanying her to India, it remains the fact that K is a recognised refugee in this country. There is no suggestion that her status has been or would be revoked. She gained her status by virtue of a satisfaction of the requirements of Article 1(A) of the Refugee Convention. Thus, there was a risk to her in her home area in the Punjab, there was no state protection available, and she could not have been expected to internally relocate anywhere in India. The simple presence of the Appellant, if the family unit were to return to India together, would not in and of itself materially reduce the risk to K, particular in light of her ex-husband's extremely nasty actions and attitudes in the past (as described in the First-tier Tribunal's decision in K's appeal).

18. Second, the fact that K is a refugee amounts, at least on the facts of this case, to an insurmountable obstacle to her being able to go to India and continue a family life with the Appellant.

19. On this basis, the Appellant succeeds in his appeal with reference to his satisfaction of the Rules and in light of TZ (Pakistan) [2018] EWCA Civ 1109.

20. For the sake of completeness, I conclude that the Appellant is unable to satisfy paragraph 276ADE(1)(vi) of the Rules in his own right. Although I have accepted that there was a land dispute in the past, it is highly unlikely that this would cause any material difficulties now and in any event he could relocate within India.

Conclusions on the Article 8 claim outside the context of the Rules

21. I now turn to consider the core provision outside the ambit of the Rules, namely section 117B(6) NIAA 2002.

22. J is a qualifying child by virtue of the length of his residence in this country.

23. I have found (in light of Mr Bramble's properly made concession) that the Appellant has a genuine and subsisting parental relationship with J.

24. The crucial issue is whether it would be reasonable to expect J to leave the United Kingdom. In considering the assessment of this question I direct myself to the guidance set out in KO (Nigeria) [2018] UKSC 53, and AB (Jamaica) [2019] EWCA Civ 661.

25. On a cumulative view of the reasons set out below, I conclude that it would not be reasonable to expect J to leave the United Kingdom. I say this on the hypothetical basis that he would leave, notwithstanding the reality that he is able to remain in the United Kingdom with K.

26. J's best interests very clearly lie in remaining in the United Kingdom. He was born in this country and has resided here throughout his 8-year life. He is clearly well-settled in his life, both in respect of educational and social matters. He enjoys stability here and having to go to India would quite clearly entail significant disruption, contrary to those best interests.

27. J is of course a refugee, having been granted in line with his mother's recognition as such following her successful appeal. It is in my view highly relevant to the question of reasonableness that the child in question currently has a status based on a risk to his mother and, by almost inevitable extension, himself (it would be close to absurd to believe that K's ex-husband would not feel any animosity towards J as well).

28. The unchallenged social worker's report clearly states that being taken from the only life that he knows would be significantly prejudicial to J. This expert evidence lends considerable support to the Appellant's case.

29. Even if it could be said that the family unit would go and reside somewhere away from Punjab, this would entail additional disruptive factors in respect of J. He knows only English and Punjabi, and would therefore very probably have to learn another language (most likely Hindi). He would also be with his mother and the Appellant, neither of whom have any contacts or immediate means of re-establishing themselves in India were they to go and live elsewhere in that country. Thus, the significant disruption and instability caused by the very fact of leaving the United Kingdom would be compounded by the circumstances in which J would be likely to find himself in India.

30. I have taken into account what is described as the "real world" situation in which the Appellant has no leave to remain in this country. However, the factors in his favour (strictly speaking, relating to J) outweigh by some distance that particular point in the Respondent's favour.

31. All of the requirements of section 117B(6) NIAA 2002 are met and the Appellant therefore succeeds in his appeal.

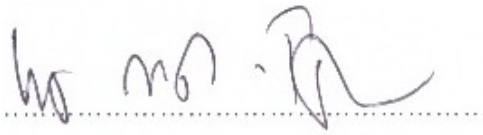
Anonymity

32. I have decided to make an order in this case because of the existence of the Appellant's stepson and the need to protect his identity.

Notice of Decision

The decision of the First-tier Tribunal involved the making of material error of law and it has been set aside.

I remake the decision by allowing the Appellant's appeal.



Signed Date: 21 May 2019

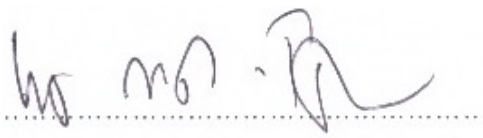
H Norton-Taylor

Deputy Upper Tribunal Judge Norton-Taylor

TO THE RESPONDENT

FEE AWARD

As I have remade the decision and allowed the appeal and because a fee has been paid or is payable, I have considered making a fee award in respect of the proceedings in the First-tier Tribunal. I have decided to make a whole fee award of £140.00.



Signed Date: 21 May 2019

H Norton-Taylor

Deputy Upper Tribunal Judge Norton-Taylor

ANNEX: ERROR OF LAW DECISION

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/09720/2016

THE IMMIGRATION ACTS

Heard at Field House
On 14 January 2019

Decision & Reasons Promulgated

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Before
DEPUTY UPPER TRIBUNAL JUDGE NORTON-TAYLOR

Between

D S
(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

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 their 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.

Representation:
For the Appellant: Ms R Bagral, Counsel, instructed by Gills Immigration
For the Respondent: Mr D Clarke, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is a challenge by the Appellant against the decision of First-tier Tribunal Judge Easterman (the judge), promulgated on or about 17 August 2018, dismissing his appeal against the Respondent's decision of 8 April 2016.

2. In essence the Appellant's case had been based on his claimed relationship with K, a recognised refugee in the United Kingdom, and his stepson, J, also a refugee (granted status in line with his mother). The Appellant's original appeal had been dismissed by the First-tier Tribunal back in 2017. This had been successfully challenged before the Upper Tribunal and the matter remitted.

The judge's decision

3. It is clear that a good deal of effort went into the judge's decision. He has clearly set out the evidence before him and the submissions made by the representatives. The relevant findings in relation to the stepson begin at [62] and run to [78]. The findings in respect of K run from [79] to [89].

4. Ultimately the judge appears to conclude that there was not a genuine relationship between the Appellant and K, but at the same time he suggests that the whole family unit could go to India and live there together.

The grounds of appeal and grant of permission

5. The grounds of appeal suggest that the judge was wrong to have concluded that K and J could go to India, as both were refugees. In addition, it is said that the judge failed to deal with J's circumstances adequately.

6. Permission to appeal was granted by Designated First-tier Tribunal Judge McCarthy on 21 November 2018. He makes the point that there appeared to be insufficient findings regarding the nature of the relationship between the Appellant and the stepson. If there was a sufficiently strong relationship, section 117B(6) of the Nationality, Immigration and Asylum Act 2002 would have come into play. It is also commented that there were arguably insufficient findings relating to the Appellant's relationship with K.

The hearing before me

7. Following what was clearly a productive pre-hearing discussion between the representatives, Mr Clarke accepted that there were insufficiently clear findings by the judge relating to the Appellant's relationship with J. He also, quite rightly in my

view, accepted that the judge had not undertaken an adequate assessment of the reasonableness question under section 117B(6) of the 2002 Act.

8. Ms Bagral submitted that the judge was also wrong in respect of his consideration of the relationship between the Appellant and K. These two relationships were in a sense bound up together and the judge's findings were somewhat confused.

Decision on error of law

9. I conclude, with respect, that the judge has materially erred in law on the two core issues in the case, namely the Appellant's relationship with J and that with K.

10. In respect of the former, Mr Clarke has effectively conceded the point and in my view quite rightly so. Although there are findings that are potentially pertinent to the relationship, it is unclear as to whether the judge was concluding that there was a genuine and subsisting parental relationship of any sort. We know from decisions such as Ortega (remittal; bias; parental relationship) [2018] UKUT 00298 (IAC) and SR (subsisting parental relationship – s117B(6)) Pakistan [2018] UKUT 00334 (IAC) that a person who is not a biological parent can potentially have such a relationship.

11. In this case, it was the Appellant's claim to be the stepfather of J. There was clear evidence in support of this, not least of which was the report of an independent social worker which, whilst referred to by the judge in his decision, does not appear to have been factored into the final conclusions on what was a core issue in the appeal.

12. As to the relationship between the Appellant and K, the judge's findings at [89] indicate an adverse view. However, at other points in the decision, for example [87] and [91], the judge appears to be suggesting that there was a relationship. Although the error on this point is less clear than in respect of the first relationship, the two are in reality closely interlinked and taking matters as a whole I conclude that there is a material error here as well.

13. In light of the above I set the judge's decision aside.

Disposal

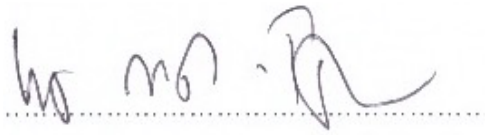
14. Although the remaking of the decision in this appeal will require a certain amount of fact-finding, this does not prevent it from being retained in the Upper Tribunal. I am aware of the appeal's history and the need for the parties to obtain finality. In my view this can be properly done in a resumed hearing before me in due course. I will be able to receive further written evidence and, if necessary, oral evidence on the two core issues in the appeal, namely the relationship between the Appellant and K and his relationship with J.

15. I issue relevant directions to the parties, below.

Notice of Decision

The decision of the First-tier Tribunal contains material errors of law and I set it aside.

I adjourn this appeal for a resumed hearing in the Upper Tribunal before me.



Signed Date: 27 January 2019

Deputy Upper Tribunal Judge Norton-Taylor

Directions to the parties

1. **Any further evidence relied on by either party shall be filed with the Upper Tribunal and served on the other side no later than 14 days before the resumed hearing;**
2. **Updated witness statements for the Appellant and K shall be filed with the Upper Tribunal and served on the Respondent within the same timeframe as direction 1;**
3. **Oral evidence at the resumed hearing will be permitted, but only if updated witness statements are provided in time;**
4. **The Appellant's representatives are to check with the Upper Tribunal's administration in good time to ensure that a Punjabi interpreter has been booked for the resumed hearing.**