Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/21819/2016

THE IMMIGRATION ACTS

Heard at Priory Courts, Birmingham	**Decision & Reasons Promulgated**
On 2nd April 2019	**On 08 April 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE M A HALL

Between

AMANPREET [S]
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr S Toora of Counsel, instructed by Birmingham Law Partnership
For the Respondent: Mr D Mills, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction and Background

1. The Appellant appealed against a decision of Judge Jessica Pacey (the judge) of the First-tier Tribunal (the FtT) promulgated on 15th August 2017. The Appellant is an Indian citizen born 3rd August 1991.

2. The Appellant applied for leave to remain in the UK based upon his private and family life. That application was refused on 11th December 2014 without an in country right of appeal. Following judicial review proceedings the Respondent issued a new decision dated 5th September 2016, maintaining the refusal, but conceding that the Appellant should have an in country right of appeal.

3. The Appellant's application was made on the basis that he is in a relationship with a British citizen Jacinta Rice, and he has a parental relationship with his son born 11th January 2013 who is a British citizen. The Respondent refused the application on suitability grounds. The Appellant had committed criminal offences which the Respondent regarded as persistent offences and therefore refused the application with reference to S-LTR.1.5. The Respondent's view was that the presence of the Appellant in the UK was not conducive to the public good. The Appellant had failed to declare all his convictions in his application form and therefore the application was refused with reference to S-LTR.2.2.(b).

4. Because the application was refused on suitability grounds, the Respondent's view was that the Appellant was not entitled to leave to remain with reference to either Appendix FM in relation to family life, or paragraph 276ADE(1) in relation to private life. The Respondent did not find that the application raised any exceptional circumstances which would justify granting leave to remain with reference to Article 8 outside the Immigration Rules.

5. The appeal was heard on 7th August 2017. It was conceded on behalf of the Appellant that he could not satisfy the requirements for leave to remain as the partner of a British citizen or the father of a British citizen under the Immigration Rules. It was contended that his appeal should be allowed with reference to Article 8 of the 1950 European Convention on Human Rights (the 1950 Convention) outside the Immigration Rules, based upon his family life with his British partner and his British child. It was also contended that the Appellant had established a private life in the UK since his arrival at 10 years of age on 25th April 2002.

6. The judge noted the absence of the Appellant's partner at the hearing and the lack of evidence from the partner to confirm that she and the Appellant were in an ongoing relationship. The judge found that the Appellant's removal would not be disproportionate and would not breach Article 8 of the 1950 Convention.

7. The Appellant applied for and was granted permission to appeal.

Error of Law

8. On 17th January 2019 I heard submissions from both parties in relation to error of law. The Respondent contended there was no material error. On behalf of the Appellant it was submitted that the judge had erred in law primarily by failing to consider section 117B(6) of the Nationality, Immigration and Asylum Act 2002 (the 2002 Act).

9. Full details of the application for permission to appeal, the grant of permission, the submissions made by both parties, and my conclusions are contained in my decision dated 21st January 2019 promulgated on 28th January 2019. In brief summary I found that the judge had erred in law and set aside the FtT decision. I set out below paragraphs 13-19 of my decision, which contain my conclusions and reasons for setting aside the FtT decision;

> "13. I find that the judge did not err in law in considering the relationship between the Appellant and his partner. The judge at paragraph 22 was entitled to note that the partner was not present at the hearing to support the Appellant, and had not submitted any witness statement to confirm their relationship.
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> 14. In my view the judge did err in law in considering the Appellant's family life with his son. It was accepted that the son is a British citizen born 11th January 2013. Therefore the best interests of the son must be a primary consideration. This does not mean a paramount consideration or the only consideration. The best interests of a child can be outweighed by other considerations.
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> 15. However in this appeal the judge does not make a specific finding as to the best interests of the child. The judge also materially erred by not undertaking an adequate consideration of the factors contained in section 117B of the 2002 Act. In particular it was a material error of law to fail to consider section 117B(6). As it was accepted that the child is a qualifying child, the judge should have made findings as to whether the Appellant has a genuine and subsisting parental relationship with his son, and whether it would be reasonable to expect the child to leave the UK.
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> 16. SR (subsisting parental relationship, section 117B(6)) [2018] UKUT 334 (IAC) (which was decided after the FtT decision in this case) confirms the question of whether it would not be reasonable to expect a child to leave the UK in section 117B(6) of the 2002 Act does not necessarily require a consideration of whether the child will in fact or in practice leave the UK. Rather, it poses a straightforward question, would it be reasonable to expect the child to leave the UK?
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> 17. For the reasons given above I find that the FtT decision is unsafe and must be set aside. The findings that the Appellant cannot satisfy the requirements of the Immigration Rules in relation to family and private life are preserved. Having considered the Senior President's Practice Statements at paragraph 7, I do not find it appropriate or necessary to remit this appeal to the FtT. The decision will be remade by the Upper Tribunal.
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> 18. It is a matter for the Appellant as to whether any further evidence will be called. It is understood that no interpreter will be required. If that is not the case the Upper Tribunal must be informed immediately.
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> 19. The purpose of the next hearing will be to consider Article 8 outside the Immigration Rules, in particular the best interests of the child, whether there is a genuine and subsisting parental relationship between the Appellant and his child, whether it would be reasonable to expect the child to leave the UK, and there will be consideration of the public interest."

Remaking the Decision – Upper Tribunal Hearing 2nd April 2019

10. I ascertained that I had all documentation upon which the parties intended to rely, and each party had served the other with any documentation upon which reliance was to be placed. I had the Respondent's bundle with Annexes A-B, which had been before the FtT, and the Appellant's bundle which had been before the FtT, comprising 301 pages. In addition the Appellant had submitted a further bundle, comprising 123 pages, and Mr Toora submitted a skeleton argument.

11. The Appellant attended the hearing. Mr Toora explained that his partner who had submitted a witness statement, could not attend the hearing as she had to travel abroad in connection with her employment, at short notice, on 29th March 2019. Mr Toora did not apply for an adjournment and was content to proceed without the partner giving evidence.

12. Mr Mills applied for an adjournment on the basis that the Court of Appeal on 12th March 2019 had heard two linked cases dealing with the issue that was relevant in this appeal, that being the approach to be taken when considering whether it would be reasonable to expect a British child to leave the UK. The current Home Office guidance is not in line with Upper Tribunal case law, such as SR Pakistan and the more recent decision of JG (section 117B(6): "reasonable to leave" UK) Turkey [2019] UKUT 00072 (IAC), which Mr Mills advised was the subject of an appeal by the Respondent. Mr Mills submitted that it would be helpful if the Court of Appeal judgments were published before this appeal was decided. Mr Toora opposed the application.

13. I considered the adjournment application on the basis that if there could not be a fair hearing, it would be appropriate to grant an adjournment. In my view there could be a fair hearing without an adjournment. It was unclear when the Court of Appeal judgments were going to be published. It was unclear what the decisions would be. In my view it would, at the present time, be appropriate to consider the existing Upper Tribunal case law. I therefore refused the adjournment application.

14. The Appellant was called to give oral evidence which he gave in English. He adopted his witness statement dated 26th March 2019. The Appellant was questioned by both representatives. I have recorded all questions and answers in my Record of Proceedings and it is not necessary to reiterate them here. If relevant I will refer to the oral evidence when I set out my findings and conclusions.

15. I then heard oral submissions from Mr Mills. I was asked to find that there was very little evidence to prove a parental relationship between the Appellant and his son, other than the Appellant's evidence. I was asked to note the absence of any live evidence from the partner.

16. Mr Mills accepted that if I found a genuine parental relationship, then following the guidance in JG, it would not be reasonable to expect the British child to leave the UK. Mr Mills' point was that JG was wrongly decided.

17. I then heard submissions from Mr Toora who relied upon his skeleton argument. I was asked to find that there is ample evidence to prove the parental relationship between the Appellant and his son, and I should therefore follow the guidance in JG, and find it would not be reasonable to expect the British child to leave the UK. Therefore the appeal should be allowed with reference to section 117B(6) of the 2002 Act.

18. At the conclusion of oral submissions I reserved my decision.

My Conclusions and Reasons

19. This is an appeal that cannot succeed under the Immigration Rules that relate to Article 8. That was accepted on behalf of the Appellant before the FtT.

20. The factual matrix is that the Appellant is also known as Dillon Mendez. He arrived in the UK as a visitor with his mother in April 2002. I found that the Appellant and his mother remained without leave.

21. An application for indefinite leave to remain as the dependant of his mother was made on 3rd August 2009 and refused on 10th November 2011. The Appellant continued to remain in the UK without leave. He then applied for leave to remain based upon his family and private life in July 2014, which application was refused on 11th December 2014, without a right of appeal. Following judicial review proceedings a new decision was made by the Respondent dated 5th September 2016, refusing the application, and which brought about the appeal.

22. There is DNA evidence that proves the Appellant is the father to his British son who was born on 11th January 2013. The son is now 6 years of age.

23. The son lives with the Appellant's partner and his half-sister who is 10 years of age. I accept that the Appellant lives with them some of the time, but does not give his address as their family home. The Appellant gives his address as that of his mother and I find that is his main residence.

24. I am satisfied that Article 8 is engaged. It is engaged because the Appellant has established a private life in the UK, and it is engaged because I am satisfied that he has family life with his son.

25. I find that there is a genuine and subsisting parental relationship between the Appellant and his son. I make this finding for the following reasons.

26. I accept the oral evidence of the Appellant that he spends a considerable amount of time with his son. I accept that he very often takes him to and picks him up from school. There is supporting evidence to confirm the extent of the Appellant's

relationship with his son. For example at page 11 of the Appellant's bundle prepared for the Upper Tribunal hearing there is a letter dated 15th March 2009 addressed to the Appellant, making reference to the Football Academy attended by his son. There is reference to the Appellant attending training sessions with his son.

27. At page 12 of the same bundle there is a letter dated 25th March 2019 addressed to the Appellant making reference to his son attending a fight club and having attended for the last two years. There is reference to the Appellant attending every week with his son.

28. In addition there are numerous photographs of the Appellant and his son.

29. I therefore conclude that the Appellant is the biological father of his son, and I am satisfied he has a genuine and subsisting parental relationship with him.

30. The best interests of the Appellant's son are a primary consideration. I find that his best interests would be served by maintaining the status quo. His mother is his primary carer, but he has frequent contact with the Appellant. The son is a British citizen, born in this country. It is clear that his best interests would be to remain in the UK, the country of which he is a citizen.

31. I set out below section 117B(6) of the 2002 Act;

> '(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
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> (b) it would not be reasonable to expect the child to leave the United Kingdom.'

32. The Appellant's son is a qualifying child because he is a British citizen. I have found that the Appellant has a genuine and subsisting parental relationship with him. I therefore need to consider whether it would not be reasonable to expect the Appellant's son to leave the UK.

33. In my view the correct legal approach is as outlined in SR Pakistan to which I have referred earlier in this decision. That approach was confirmed in JG, in which it was decided that section 117B(6) of the 2002 Act requires a court or Tribunal to hypothesise that the child in question would leave the UK, even if this is not likely to be the case, and ask whether it would be reasonable to expect the child to do so.

34. It is clear that the Appellant's son would not have to leave the UK. If the Appellant had to leave, the son would remain with his mother in the UK. However I must consider whether it would be reasonable to expect a British child to leave the UK, even though in practice he will not do so. It was conceded by Mr Mills that it would not be reasonable to expect the Appellant's son to leave the UK and I find that to be the case. I have taken into account that the Appellant does not satisfy the suitability criteria in order to be granted leave to remain under the Immigration Rules. The

behaviour of the Appellant does not however mean that it would be reasonable to expect his son to leave the UK.

35. In conclusion, as I find there is a genuine and subsisting parental relationship between the Appellant and his son, the best interests of the son would be to remain in the UK, and it would not be reasonable to expect him to leave the UK, I find that the appeal must succeed by reason of section 117B(6) which states that in the case of a person, such as the Appellant, who is not liable to deportation, the public interest does not require his removal when section 117B(6) is satisfied. The appeal therefore is allowed with reference to Article 8 outside the Immigration Rules.

Notice of Decision

The decision of the First-tier Tribunal contained an error of law and was set aside. I substitute a fresh decision.

The appeal is allowed on human rights grounds with reference to Article 8 of the 1950 Convention.

Anonymity

There has been no request for anonymity. I see no need to make an anonymity direction.

Signed Date 3rd April 2019

Deputy Upper Tribunal Judge M A Hall

TO THE RESPONDENT
FEE AWARD

I make no fee award. The appeal has been allowed because of evidence considered by the Tribunal which was not before the initial decision maker.

Signed Date 3rd April 2019

Deputy Upper Tribunal Judge M A Hall