Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/01790/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 25 September 2019	**On 17 October 2019**

Before

UPPER TRIBUNAL JUDGE GLEESON

Between

MAHBUB [H]
(NO ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Shahadoth Karim, counsel appearing by direct access
For the Respondent: Mr tony Melvin, a Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appeals with permission against the decision of the First-tier Tribunal dismissing his appeal against the respondent's decision to refuse him leave to remain in the United Kingdom as the spouse of a person present and settled here. On 1 April 2016, the respondent refused leave to remain on that basis, finding the marriage to be a marriage of convenience not entitling the applicant to be treated as his wife's partner. The respondent was not satisfied that the appellant and his wife intended to live together permanently. The couple already had a child, who was 15 months old at the date of the refusal letter.

Procedural history

2. The decision of First-tier Judge Walker in September 2017 is the *Devaseelan* starting point. Judge Walker found that although the appellant and his wife knew each other reasonably well, and might indeed have been in a relationship 'at some stage' their marriage and their asserted relationship was not subsisting nor genuine. He dismissed the appeal.

3. On 11 June 2018, DUTJ Lewis overturned that decision and remitted the appeal to the First-tier Tribunal for rehearing. The adverse finding of fact regarding the marital relationship was not impugned in the appeal and was preserved, although neither Judge Walker nor Judge Lewis went as far as to say that the marriage was a marriage of convenience, nor that the child was not the appellant's child.

4. Judge Lewis at [14]-[16] gave a very clear direction as to how the *Devaseelan* starting point should be approached by the Judge rehearing the appeal:

> "14. … It is pleaded, for example, that the [First-tier Judge] has erred in failing to take account that the parties live together, in failing to have regard to the documentary evidence, and/or in failing to have regard to the fact that the couple had ad a child together. It seems to me absolutely clear that the Judge had all of these matters well in mind. He refers to the supporting evidence, and clearly had it in mind that there was a child. I can find nothing in the challenge that undermines the findings of the First-tier Judge: in my judgment they were sustainably made without error of law.
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> 15. In my judgment those findings should stand as having been sustainably made. However, that does not mean to say that those findings could not be revisited within the principles of *Devaseelan* on a rehearing: they should stand as a starting point to consideration of remaking the decision in the appeal. In this context it is to be noted that the First-tier Judge expressed concerns about the absence of certain sorts of supporting evidence: it is open to the appellant, together with [his wife] if he or they wish to maintain they are indeed in a committed subsisting genuine marital relationship to advance further evidence in support: for example, one matter that the Judge expressed concerning about was the absence of independent witnesses and/or testimony from members of [the wife's] family who might have reasonably been expected to be willing and able to give evidence as to the nature of the relationship.
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> 16. Accordingly, in upholding and preserving the findings of the First-tier Judge in respect of the relationship between the appellant and [his wife] I do not preclude the appellant from revisiting this matter … on the basis that it is for the appellant to advance evidence that would permit the next Judge to revisit the finding of Judge Walker pursuant to the guidance in *Devaseelan*. Of course, if the appellant now wishes to acknowledge and accept the findings of the Judge, he will no doubt wish to shift the focus of his case to providing evidence as to the nature and extent of his contact and relationship with his child."

First-tier Tribunal decision

5. The appeal was reheard in the First-tier Tribunal by First-tier Judge Geraint Jones QC. The appellant was unrepresented and appeared in person. There was no

updated witness statement, but the appellant, his wife, and his cousin all gave oral evidence.

6. By this stage, the parties had lost their joint accommodation and the appellant was living with a school friend. The wife was living with her sister, in Essex, where there was only room for her and the child. The wife had converted to Islam. The wife and the child are both British citizens. The appellant expressed doubt that his wife would go to Bangladesh with him, but in her oral evidence she said that she had not yet decided the point. They were both working for Tesco supermarkets and each earned about £600 a month.

7. The evidence about the appellant's daughter was that she had been born in January 2015 and was now attending pre-school. The appellant's daughter appeared to be a normal, well-adjusted young child who lived with her mother and her aunt. Judge Jones found that the appellant saw his daughter once every 10-14 days, for an unspecified period of time, but that he did not make any, or any significant financial contribution to her welfare. Judge Jones held that it was 'probable that the appellant's daughter recognises the appellant as her father', but was not satisfied that the couple and the child had lived together as one household for any significant period of time.

8. Judge Jones found that the child's best interests were being properly served by living under the sole care and control of her mother; the child and the wife were British citizens and would not be required to leave the United Kingdom if the appellant were removed. Contact could be maintained by electronic means. He held that there was no imminent or even medium-term prospect of the parties resuming cohabitation, partly because of their very low joint income.

9. The appeal was dismissed, both within and outwith the Immigration Rules HC 395 (as amended). The appellant appealed to the Upper Tribunal.

Permission to appeal

10. There were six grounds of appeal. The appellant contended that there were no negative credibility findings in relation to the appellant, his wife or his cousin, all of whom gave oral evidence; that the Judge appeared to accept that the appellant was seeing his daughter regularly, although not living with her and that it would be unreasonable for her to be expected to relocate to Bangladesh as a British citizen child; that there were insufficient findings of fact about the nature of the relationship between the appellant and his daughter, relying on *SR* (subsisting parental relationship, s117B(6)) [2018] UKUT 334 (IAC); that the unchallenged evidence of the cousin about the couple's cohabitation had not been considered properly; that *MA (Pakistan) and others, R on the application of v Upper Tribunal (Immigration and Asylum Chamber and another* [2106] EWCA Civ 705 had not been properly applied; that the child's right to have direct in person access and contact with her father had not been properly considered; that the Judge raised issues on which the appellant, acting in person, had not been given an opportunity to comment, that the Judge's findings lacked anxious scrutiny and failed to take account of photographs submitted.

11. Permission was granted by Upper Tribunal Judge Owens:

> "2. The appellant asserts that he has established a family life with his British citizen daughter in the UK. It would be a disproportionate breach of Article 8 ECHR to remove him from the UK.
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> 3. It is arguable that the Judge failed properly to assess Article 8 ECHR outside the rules by failing to correctly apply section 117B(6) of the Nationality, Immigration and Asylum Act 2002 to his findings of fact and misapplying an incorrect test."

Upper Tribunal hearing

12. The appellant, his wife and their daughter were present at the Upper Tribunal hearing. They are now living together, having found accommodation they can afford, it seems.

13. For the appellant, Mr Karim reminded me that despite the respondent's doubts about the genuine nature of their relationship, the appellant's wife had appeared at every hearing to support him. The First-tier Judge had overlooked her witness statement, in which she said they both contributed to financial commitments and to their daughter's upkeep. They had cohabited until they lost their flat in September 2017, but as of 1 September 2019 they had finally been able to find somewhere to live together as a family and were now doing so. He asked me to allow the appeal outright.

14. For the respondent, Mr Melvin produced an out of time Rule 24 Reply to the grant of permission to appeal, which I have treated as his skeleton argument. Mr Melvin submitted that it was clear from Judge Jones' decision that he was not satisfied that the appellant had a genuine and subsisting relationship with his wife and daughter, and that Judge Jones had heard the oral evidence and his decision was sustainable.

15. Mr Melvin accepted that the appellant had been disadvantaged by not being represented. He accepted that another Judge might have reached a different conclusion, and that the decision had deficiencies, but argued that they would not have made a material difference to the outcome of the appeal.

16. If I were to conclude that the decision was unsound, Mr Melvin said that the decision should be remade by the Upper Tribunal. He would not ask to have the appellant or his wife tendered for cross-examination.

Analysis

17. A Tribunal should be slow to find a lack of family and private life between parent and minor child. I find that Judge Jones failed properly to consider the new evidence which was before him, but that he did find that she recognised him as her father and that they saw each other every 10 to 14 days. That is more than sufficient to establish a genuine and subsisting parental relationship.

18. I also find that Judge Jones failed to evaluate the wife's evidence that they bear the family expenses jointly, and that of the cousin that they were cohabiting until they lost their accommodation in September 2017 and are now cohabiting again.

19. Under of Section 117 of the Nationality, Immigration and Asylum Act 2002 (as amended) at 117B(6):

> "117B(6) In the case of a person who is not liable to deportation the public interest does not require the person's removal where –
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> (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."

20. I am satisfied that the appellant has a genuine and subsisting parental relationship with his daughter, and I take account of Judge Jones' finding of fact that it would not be reasonable to expect this child to leave the United Kingdom and go with her father to live in Bangladesh. No *MA (Pakistan)* strong reasons for separating the appellant from his daughter have been shown. The public interest does not require his removal.

21. Accordingly I set aside the decision of the First-tier Tribunal. I substitute a decision allowing this appeal.

Signed *Judith AJC Gleeson* Date: 14 October 2019

Upper Tribunal Judge Gleeson