**Upper Tribunal**

**(Immigration and Asylum Chamber)** **Appeal number: HU/01389/2019 (V)**

**THE IMMIGRATION ACTS**

**Heard Remotely at Manchester CJC** **Decision & Reason Promulgated**

**On 4 November 2020** **On 10 November 2020**

**Before**

**UPPER TRIBUNAL JUDGE PICKUP**

**Between**

**SS**

**(ANONYMITY ORDER MADE)**

Appellant

**and**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

For the appellant: Ms A Bhachu of counsel, instructed by SKR Legal Solicitors

For the Respondent: Mr C Bates, Senior Presenting Officer

**DECISION AND REASONS (P)**

This has been a remote hearing which has been consented to by the parties. The form of remote hearing was video by Skype (V). A face to face hearing was not held because it was not practicable and all issues could be determined in a remote

hearing. At the conclusion of the hearing I reserved my decisions and reasons, which I now give. The order made is described at the end of these reasons.

1. The appellant, who is a national of India with date of birth given as 20.5.75, has appealed with permission to the Upper Tribunal against the decision of the First-tier Tribunal promulgated 30.7.19 (Judge Juss), dismissing appeal against the decision of the Secretary of State, dated 11.1.19, to refuse his application made on 29.5.18 for Leave to Remain in the UK on the basis of family and private life under Appendix FM of the Immigration Rules and outside the Rules on Article 8 ECHR human rights grounds. The application was made on the basis of the appellant's claimed parental relationship in the UK with his daughter, PK.

2. The respondent refused the application because the appellant failed to provide evidence that he had a child in the UK, so that he failed to meet the parent eligibility relationship requirement. He also failed the immigration status requirement as he has never had leave to enter or remain in the UK so that his immigration status has been unlawful throughout the period of 15 years he claims to have been in the UK.

3. The First-tier Tribunal was not satisfied that the appellant had discharged the burden of proof to demonstrate that he met the requirements of s117B(6) or that there were exceptional circumstances rendering the decision unjustifiably harsh and disproportionate.

4. The grounds of application for permission to appeal argued that the First-tier Tribunal Judge treated his finding that the appellant does not play an active role in his daughter's upbringing as dispositive of the question whether he has a genuine and subsisting relationship with her. The judge's assessment of the child's best interests was also challenged.

5. The First-tier Tribunal refused permission to appeal on 20.9.19. However, when the application was renewed to the Upper Tribunal, Upper Tribunal Judge Jackson granted permission, considering it arguable that the First-tier Tribunal "*failing to make any clear findings as to whether the appellant has a genuine and subsisting relationship with his daughter in accordance with SR (subsisting parental relationship – section 117B(6)) Pakistan [2018] UKUT 00334 (IAC), wherein it was confirmed that a person may still be able to establish this even without being able to demonstrate an active role in the child's upbringing (which appears to be the focus of the First-tier Tribunal's reasoning).*"

6. Judge Jackson granted permission on all grounds, though she noted that the second ground had less merit given the lack of evidence before the First-tier Tribunal as to the child's best interests.

7. I have carefully considered the submissions made to me during the remote hearing, together with the evidence that was before the First-tier Tribunal at the

appeal hearing, in light of the impugned decision and the grounds of appeal as drafted.

8. The day before the remote hearing, the appellant's representatives attempted to adduce further evidence of contact between the appellant and his daughter, without making any application under Rule 15 (2A), contrary to the directions issued by the Upper Tribunal. However, that evidence was not before the First-tier Tribunal at the appeal hearing and I cannot take it into account in considering whether the First-tier Tribunal erred in the making of the decision.

9. At the outset of the hearing before me, Mr Bates very properly conceded that the decision of the First-tier Tribunal was flawed for error of law and did not resist the appeal. For the reasons set out below, I agree with the submissions of both representatives that the First-tier Tribunal's assessment of 'genuine and subsisting parental relationship' in consideration of s117B(6) was materially flawed.

10. The appellant relied on the following alleged facts. He claims to have entered the UK in May 2003 on a visit visa, but this is disputed by the respondent; there is no evidence of him ever being given leave to enter or remain. He claims to have met and established a relationship with MK in 2001 and their child PK was born in 2010. The relationship allegedly broke down and contact was prevented by the child's mother until the Family Court Child Arrangement Order was made in July 2017. DNA confirms the appellant's biological relationship with the child and the birth certificate for the child has now been amended to reflect the appellant's name as the father. The appellant claimed to communicate with his child by telephone and that she comes from her home in Liverpool to stay with him in Birmingham about every 4 weeks.

11. The First-tier Tribunal Judge heard oral evidence and carefully considered the documentary evidence but reached the conclusion that there was no credible evidence to support the claimed contact between the appellant and his child. There was no evidence of telephone calls and a witness statement purported to be made by his former partner, who did not give evidence, was neither dated nor signed so that little if any weight could be accorded to it. At [17] of the decision the judge concluded that the appellant had failed to adduce any evidence of the child's best interests being in maintaining contact with him. No enquiries had been made of the child.

12. At [18] of the decision, the judge took into account the whole of the evidence in the round but concluded "*I am not satisfied that the appellant plays a part in the life of the child*."

13. In the following paragraphs, the judge directs himself on the current relevant case law, accepting that whether a person has a 'parental relationship' with a child necessarily depends on the individual circumstances, including the role played by that person in caring for and making decisions in relation to the

child. The judge had noted that the Family Court awarded 'parental responsibility' to the mother alone. But the judge also accepted that, whilst it is a relevant consideration, it is not necessary for an individual to have 'parental responsibility' in order to have a 'parental relationship'. However, he cited R (RK) v SSHD (s117B(6): "parental relationship") [2016] UKUT 31 (IAC), where the Upper Tribunal held that "*what is important is that the individual can establish that they have taken on the role that a 'parent' usually plays in the life of their child*."

14. At [20] of the decision, the judge also cited the decision of the Court of Appeal in SSHD v VC (Sri Lanka) [2017] EWCA Civ 1967, in the case of a parent with limited 'non-caring' contact with a child, finding that VC's failed because it was not possible on the facts to determine that he had a 'genuine and subsisting parental relationship'. It was also noted that biological parentage without more is insufficient and that a biological parental relationship wherein that parent does not provide at least some element of direct parental care to the child is also insufficient for a genuine parental relationship to be a subsisting one."

15. From [21] onwards, the judge went on to consider paragraph 276ADE and whether there were any exceptional circumstances (finding none). At [26] of the decision, the judge concluded that the public interest in immigration control was not outweighed and the appellant could not discharge the burden of proof to demonstrate that it would be unjustifiably harsh to expect him to return to India. Accordingly, the appeal was dismissed.

16. It is clear from the considerations set out between [19] and [20] of the decision that although the judge did not cite SR, he did accept that a person unable to demonstrate an active role in their child's upbringing may still be able to establish a 'genuine and subsisting relationship' with that child. However, the judge relied on Macfarlaine LJ in VC who stated that a biological parent unable to provide at least some element of direct parental care to the child fails to demonstrate that their parental relationship is 'subsisting'. It is also clear from the preceding assessment of the evidence that the judge rejected the claims that the child had ever stayed with him in Birmingham, or even that appellant maintained telephone contact with his child.

17. On the very limited evidence presented to the First-tier Tribunal, the judge was unable to to find that the appellant had discharged the burden on him to prove a 'genuine and subsisting parental relationship' with his child.

18. However, when relying on VC, the judge did not take into account the more recent decision of the Court of Appeal in AB & AO (Jamaica) [2019] EWCA Civ 661, which had been promulgated in April 2019, before the First-tier Tribunal appeal hearing. In that more recent decision, the Court of Appeal considered VC and SR disagreed with McFarlane LJ and to some extend with Upper Tribunal Judge Plimmer in SR. At [90] to [96] of AB & AO, the Court of Appeal stated:

*"90. Returning to the case of SR (Pakistan) I would also respectfully agree with what was said by UTJ Plimmer at para. 39:*

> *"There are likely to be many cases in which both parents play an important role in their child's life and therefore both have subsisting parental relationships with the child, even though the child resides with one parent and not the other. There are also cases where the nature and extent of contact and any break in contact is such that although there is contact, a subsisting parental relationship cannot be said to have been formed. Each case turns on its own facts."*

91. *On the facts of SR (Pakistan), at para. 40, UTJ Plimmer concluded that SR did have a parental relationship with the child in question and that it was genuine and subsisting for the purposes of section 117B(6)(a). It may have been a limited parental relationship but that did not mean that it was not genuine or subsisting. SR and his daughter, A, had seen each other on a regular fortnightly basis. There were unsupervised sessions that occurred away from a contact centre, in which SR provided A with elements of direct parental care. For that period of time SR was not looking after and directly caring for A in any other capacity than as a parent. Although, therefore, the Judge was satisfied that SR played "no active role in any significant decision-making regarding A's day to day care and well-being, he has nonetheless developed in recent months a genuine and subsisting parental relationship with her."*

92. *As is apparent from that passage, on the facts of that case, UTJ Plimmer was satisfied that SR was providing an element of "direct parental care". The issue of law which arises before this Court now is whether such an element is an essential requirement of there being a "genuine and subsisting parental relationship" for the purpose of section 117B(6)(a). At paras. 36-37 UTJ Plimmer considered that such an element is required in this context. For that proposition she relied upon the judgment of McFarlane LJ in Secretary of State for the Home Department v VC (Sri Lanka) [2017] EWCA Civ 1967, in particular at paras. 42-43. In order to assess whether that understanding of the law is correct I must therefore go to the underlying judgment of McFarlane LJ in the case of VC (Sri Lanka),"* (emphasis added).

93. *In that case McFarlane LJ said, at paras. 42-43:*

> *"42. For the reasons put forward by Mr Cornwell, it was, in my view, not possible for the circumstances of this case to come within the requirements of paragraph 399(a) of the Rules. On the basis of the Court of Appeal's analysis of the family history, [VC] had played only a minimal role in the care of his children and, even when living at the family home, he had on a regular basis rendered himself unable to act as a parent as a result of heavy drinking and abusive behaviour. By the time of the Secretary of State's decision to deport him, any vestiges of a 'parental relationship' with the children had long fallen away and had reduced to their genetic relationship coupled with the most limited level of direct contact which was intended to cease altogether on adoption. Mr Cornwell is correct to stress the words*

> *'genuine', 'subsisting' and 'parental' within paragraph 399(a). Each of those words denotes a separate and essential element in the quality of relationship that is required to establish a 'very compelling justification' [per Elias LJ in AJ (Zimbabwe)] that might mark the parent/child relationship in the instant case as being out of the ordinary.*
>
> *43. Although, as I have explained, [VC's] case falls, as it were, at the first hurdle in that it was not possible on the facts as they were at the time of the decision to hold that he had a 'genuine and subsisting parental relationship', I am also persuaded that the Appellant is correct in submitting that for paragraph 399(a) to apply the 'parent' must have a 'subsisting' role in personally providing at least some element of direct parental care to the child. The phrase in paragraph 399(a)(ii)(b) which required that 'there is no other family member who is able to care for the child in the UK' strongly indicates that the focus of the exception established in paragraph 399(a) is upon the loss, by deportation, of a parent who is providing, or is able to provide, 'care for the child'. This provision is to be construed on the basis that it applies to a category of exceptional cases where the weight of public policy in favour of the default position of deportation of a foreign criminal will not apply. To hold otherwise, and to accept Ms Jegarajah's submission that her client comes within the exception simply because he has some limited, non-caring contact with his child would enable very many foreign criminals to be included in this exception."*"

19. After setting out the provisions, the Court of Appeal continued from [94]:

> *"94. I respectfully disagree with UTJ Plimmer that those passages could simply be transplanted to the context of section 117B(6)(a). First, it is clear that what McFarlane LJ was considering was the different context of deportation of foreign criminals. That explains the reference to a "very compelling justification" at the end of para. 42 and also the last sentence of para. 43 in his judgment.*
>
> *95. Secondly, and even more importantly, the language and structure of para. 399(a) of the Immigration Rules which were under consideration by McFarlane LJ in VC (Sri Lanka) are different from the language and structure of section 117B(6)(a).*
>
> *96. In my view, it is clear that the provisions of para. 399 in that case included, as an essential element, that there was "no other family member who is able to care for the child in the UK". That led McFarlane LJ to interpret the provision as a whole to require "at least some element of direct parental care to the child." In my view, it would not be right to give the same interpretation to the very different language of section 117B(6)(a)."*

20. It follows that Judge Juss' reliance on VC as authority was erroneous in law. As Mr Bates also pointed out the view taken by the Court of Appeal was not simply a reframing of the issue but effectively stating that this is how the issue

should always have been assessed. The issue as to whether or not there was some form of direct parental care is not an essential element of a 'genuine and subsisting parental relationship.'

21. Considered in that light, it is not possible to salvage and preserve any of the findings of the First-tier Tribunal. The Tribunal considered the relevant issue on a flawed legal basis.

22. In passing, I do not accept Ms Bhachu's submission that the finding at [18] of the impugned decision that the appellant did not play a part in the life of the child is flawed for lack of reasoning. The reasons is set out within the same paragraph in the preceding observations about the limitations of the evidence adduced by the appellant.

23. When a decision of the First-tier Tribunal has been set aside, section 12(2) of the Tribunals, Courts and Enforcement Act 2007 requires either that the case is remitted to the First-tier Tribunal with directions, or it must be remade by the Upper Tribunal. The scheme of the Tribunals Court and Enforcement Act 2007 does not assign the function of primary fact finding to the Upper Tribunal. The errors of the First-tier Tribunal Judge vitiates all other findings of fact and the conclusions from those facts so that there has not been a valid determination of the issues in the appeal.

24. In all the circumstances, at the invitation and request of both parties to relist this appeal for a fresh hearing in the First-tier Tribunal, I do so on the basis that this is a case which falls squarely within the Senior President's Practice Statement at paragraph 7.2.

25. In the circumstances and for the reasons set out above, I find a material error of law in the decision of the First-tier Tribunal, so that it must be set aside to be remade de novo in the First-tier Tribunal.

**Decision**

The appellant's appeal to the Upper Tribunal is allowed.

The decision of the First-tier Tribunal is set aside with no findings preserved.

The decision in the appeal is remitted to the First-tier Tribunal sitting at Birmingham to be made de novo. An interpreter in Punjabi will be required.

I make no order for costs.

Signed: *DMW Pickup*

Upper Tribunal Judge Pickup

Date: 4 November 2020

**Anonymity Direction**

I am satisfied, having had regard to the guidance in the Presidential Guidance Note No 1 of 2013: Anonymity Orders, that it would be appropriate to make an order in accordance with Rules 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 in the following terms:

> "*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 to, amongst others, both the appellant and the respondent. Failure to comply with this direction could lead to contempt of court proceedings.*"

Signed: DMW Pickup

Upper Tribunal Judge Pickup

Date: 4 November 2020