Upper Tribunal
(Immigration and Asylum Chamber)

SR (subsisting parental relationship – s117B(6)) Pakistan [2018] UKUT 334 (IAC)

THE IMMIGRATION ACTS

Heard at Bradford	**Determination Promulgated**
On 14 August 2018	
	………………………………

Before

UPPER TRIBUNAL JUDGE PLIMMER

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

SR
ANONYMITY DIRECTION MADE

Respondent

1. *If a parent ('P') is unable to demonstrate he / she has been taking an active role in a child's upbringing for the purposes of E-LTRPT.2.4 of the Immigration Rules, P may still be able to demonstrate a genuine and subsisting parental relationship with a qualifying child for the purposes of section 117B(6) of the Nationality Immigration and Asylum Act 2002 ('the 2002 Act'). The determination of both matters turns on the particular facts of the case.*

2. *The question of whether it would not be reasonable to expect a child to leave the United Kingdom ('UK') in section 117B(6) of the 2002 Act does not necessarily require a consideration of whether the child will in fact or practice leave the UK. Rather, it poses a straightforward question: would it be reasonable "to expect" the child to leave the UK?*

Representation:

For the appellant:	Mrs Petterson, Senior Home Office Presenting Officer
For the respondent:	Mr Caswell, Counsel

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DECISION AND REASONS

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI2008/269) an Anonymity Order is made. Unless the Upper Tribunal or Court orders otherwise, no report of any proceedings or any form of publication thereof shall directly or indirectly identify the original Appellant. This prohibition applies to, amongst others, all parties.

Introduction

1. The appellant ('the SSHD') has appealed against the decision of the First-tier Tribunal ('FTT') to allow the respondent's ('SR') Article 8 appeal, the FTT having found that he played an active role in his child's upbringing such that he met the relevant requirements of the Immigration Rules.

2. I have anonymised SR's name because this decision refers to his child, in particular family proceedings relating to that child.

Background and procedural history

3. SR is a citizen of Pakistan. He entered the United Kingdom ('UK') in December 2011 with a student visa valid until May 2013. An in-time application to extend that leave was granted to 18 July 2014. SR then made an in-time application to remain as a spouse of a settled person, but this was refused in a decision dated 24 September 2014. This decision was appealed to the FTT. It is unnecessary to refer to the FTT's decision dated 7 April 2015 in any detail because in a decision dated 30 March 2016, the Upper Tribunal found that it contained an error of law and remitted the matter to the FTT.

4. SR now has a British citizen child born in the UK in July 2015 ('A'). He accepts that his relationship with A's mother, with whom A resides, broke down in March 2017. The main issue before the second FTT was therefore whether SR played an active role in A's upbringing and not whether SR's relationship with her mother was genuine and subsisting. The FTT found in SR's favour and the SSHD has appealed against that decision with permission having been granted by FTT Judge Andrew on 16 March 2018.

FTT decision

5. At [10] the FTT considered the main issue in dispute to be whether SR is "*taking and intending to continue to take, an active role in the child's upbringing*". Having heard oral evidence from SR, the FTT made the following relevant findings at [11] to [14]:

   (i) SR has been granted contact with A pursuant to a court order made in September 2017 – this prescribed: one hour supervised contact at a

contact centre in month one i.e. September 2017; two hours supervised contact at a contact centre in month two i.e. October 2017; three hours unsupervised contact with a handover by family members in month three i.e. November 2017 and; any other contact to be agreed between the parties. The court also formalised that A shall live with her mother.

(ii) As at the date of the FTT hearing on 30 January 2018 SR had not had any direct contact with A pursuant to the court order.

(iii) SR did little to challenge the mother's failure to facilitate contact in November or December 2017, after she returned from holiday in October 2017. However, he was in regular contact with the mother and asked about A.

(iv) The difficulties in contact taking place are as a result of the mother's failure to comply with the court order.

6. The FTT judge found at [14] that "*overall*" she was "*just about satisfied on the balance of probabilities [SR] had done all he can do to demonstrate he is taking and intends to continue to play an active role in the child's upbringing*". The FTT therefore concluded that the requirements of the Immigration Rules were met and the appeal was allowed on the basis of Article 8.

Legal framework

Immigration Rules

7. There was no dispute as to the applicable Immigration Rules. These were set out in a skeleton argument prepared for the FTT on behalf of SR. The relevant provisions are to be found at Appendix FM. Paragraph R-LTRPT1.1 provides:

> "R-LTRPT.1.1. The requirements to be met for limited or indefinite leave to remain as a parent or partner are-
> (a) the applicant and the child must be in the UK;
> (b) the applicant must have made a valid application for limited or indefinite leave to remain as a parent or partner; and either
> (c) (i) the applicant must not fall for refusal under Section S-LTR: Suitability leave to remain; and (ii) the applicant meets all of the requirements of Section ELTRPT: Eligibility for leave to remain as a parent, or
> (d) (i) the applicant must not fall for refusal under S-LTR: Suitability leave to remain; and (ii) the applicant meets the requirements of paragraphs E-LTRPT.2.2-2.4. and E- LTRPT.3.1.; and (iii) paragraph EX.1. applies."

8. E-LTRPT.2.1. to 2.4. provide as follows:

> “**Relationship requirements**
> E-ECPT.2.1. The applicant must be aged 18 years or over.
> E-ECPT.2.2. The child of the applicant must be-
> (a) under the age of 18 years at the date of application;
> (b) living in the UK; and
> (c) a British Citizen or settled in the UK.
> E-ECPT.2.3. Either -
> (a) the applicant must have sole parental responsibility for the child; or
> (b) the parent or carer with whom the child normally lives must be-
> (i) a British Citizen in the UK or settled in the UK;
> (ii) not the partner of the applicant; and
> (iii) the applicant must not be eligible to apply for entry clearance as a partner under this Appendix.
> E -ECPT.2.4. (a) The applicant must provide evidence that they have either-
> (i) sole parental responsibility for the child, or that the child normally lives with them; or
> (ii) access rights to the child; and
> (b) The applicant must provide evidence that they are taking, and intend to continue to, take an active role in the child's upbringing.”

9. Paragraph EX.1 states:

> "This paragraph applies if
> (a) (i) the applicant has a genuine and subsisting parental relationship with a child who-
> (aa) is under the age of 18 years;
> (bb) is in the UK
> (cc) is a British Citizen or has lived in the UK continuously for at least the 7 years immediately preceding the date of application;
> and
> (ii) it would not be reasonable to expect the child to leave the UK…”

10. The *Immigration Directorate Instruction on Family Migration: Appendix FM Section 1.0b, Family Life (as a Partner or Parent) and Private Life: 10-year Routes*, dated 22 February 2018 (‘the 2018 IDI’) sets out the applicable guidance on what the SSHD considers to amount to genuine and subsisting parental relationship for the purposes of Appendix FM of the Immigration Rules, in particular paragraph EX.1 as follows:

> “Is there a genuine and subsisting parental relationship?
>
> Where the application is being considered under paragraph EX.1.(a) in respect of the 10-year partner or parent routes, the decision maker must first decide whether the applicant has a “genuine and subsisting parental relationship” with the child.
>
> The phrase ‘parental relationship’ goes beyond the strict definition of parent set out in paragraph 6 of the Immigration Rules, to encompass situations in

which the applicant is playing a genuinely parental role in a child's life, whether that is recognised as a matter of law or not.

The applicant must have a subsisting role in personally providing at least some element of direct parental care to the child. This will be particularly relevant where the child is the child of the applicant's partner or where the parent is not living with the child. This means that an applicant living with a child of their partner and taking a step-parent role in the child's life could have a "genuine and subsisting parental relationship" with them, even if they had not formally adopted the child and if the other biological parent played some part in the child's life.

In considering whether the applicant has a "genuine and subsisting parental relationship" the following factors are likely to be relevant:

Does the applicant have a parental relationship with the child
• what is the relationship – biological, adopted, step child, legal guardian? Are they the child's primary carer?
• is the applicant willing and able to look after the child?
• are they physically able to care for the child?

Is it a genuine and subsisting relationship?
• does the child live with the person?
• if not, where does the applicant live in relation to the child?
• how regularly do they see one another?
• are there any relevant court orders governing access to the child?
• is there any evidence provided within the application as to the views of the child, other family members or social workers or other relevant professionals?
• to what extent is the applicant making an active contribution to the child's life?

Factors which might prompt closer scrutiny include:
• the person has little or no contact with the child or contact is irregular
• any contact is only recent in nature
• support is only financial in nature; there is no contact or emotional support
• the child is largely independent of the person."

11. In JA (meaning of "access rights") India [2015] UKUT 225 (IAC) the Upper Tribunal concluded at [12] that "taking an active role in a child's upbringing" in E-LTRPT.2.4(b) need not depend upon a parent and a child having regular face to face access. The Upper Tribunal observed at [13] that the fact that, in entry clearance cases, "direct" access is likely to be, at best, sporadic whilst parent and child live in different countries and "indirect" contact likely to be the norm does not in itself exclude the possibility of the absent parent taking "an active role in the child's upbringing", and if it did, then E-ECPT 2.4 would be a pointless provision.

12. Having said that, the Upper Tribunal went on to observe at [14] that a parent who has only "indirect" access rights to a child and who is not involved in either the day to day care of the child or in making important decisions regarding the child's life may find it difficult to prove that he/she is "taking an active role in the child's upbringing". JA's appeal was allowed because there was a clear concession limited to the facts of that case that the relevant parent played an active role notwithstanding the limitations of any direct contact.

13. In R (RK) v SSHD (s.117B(6); "parental relationship") IJR [2016] UKUT 31 (IAC) the Upper Tribunal approached the question of whether a person has a parental relationship (which of course must be considered in the context of the entire phrase "genuine and subsisting parental relationship") with a child at [42]:

> "Whether a person is in a "parental relationship" with a child must, necessarily, depend on the individual circumstances. Those circumstances will include what role they actually play in caring for and making decisions in relation to the child. That is likely to be a most significant factor. However, it will also include whether that relationship arises because of their legal obligations as a parent or in lieu of a parent under a court order or other legal obligation. I accept that it is not necessary for an individual to have "parental responsibility" in law for there to exist a "parental relationship," although whether or not that is the case will be a relevant factor. 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. In SSHD v VC (Sri Lanka) [2017] EWCA 1967 (Civ), the Court of Appeal considered the position of a parent with limited, "non-caring", contact with a child in the context of deportation. The Court concluded that VC's case fell at the first hurdle because 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". The Court of Appeal also accepted the submission 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 Court found that the phrase in paragraph 399(a)(ii)(b) requiring 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. SR is not of course subject to deportation proceedings.

15. Part 5A of the Nationality, Immigration and Asylum Act 2002 ('the 2002 Act') was inserted by amendment in July 2014, at the same time as corresponding new Immigration Rules were promulgated. Part 5A and the new Rules are designed to structure consideration by the SSHD, tribunals and courts of

claims based on Article 8 in cases concerning entry into or removal from the UK. Part 5A provides in relevant part as follows:

> **"PART 5A**
> ARTICLE 8 OF THE ECHR: PUBLIC INTEREST CONSIDERATIONS
> **117A Application of this Part**
> (1) This Part applies where a court or tribunal is required to determine whether a decision made under the Immigration Acts—
> (a) breaches a person's right to respect for private and family life under Article 8, and
> (b) as a result would be unlawful under section 6 of the Human Rights Act 1998.
> (2) In considering the public interest question, the court or tribunal must (in particular) have regard—
> (a) in all cases, to the considerations listed in section 117B, and
> (b) in cases concerning the deportation of foreign criminals, to the considerations listed in section 117C.
> (3) In subsection (2), "the public interest question" means the question of whether an interference with a person's right to respect for private and family life is justified under Article 8(2).
>
> **117B Article 8: public interest considerations applicable in all cases**
> (1) The maintenance of effective immigration controls is in the public interest.
> (2) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English—
> (a) are less of a burden on taxpayers, and
> (b) are better able to integrate into society.
> (3) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons—
> (a) are not a burden on taxpayers, and
> (b) are better able to integrate into society.
> (4) Little weight should be given to—
> (a) a private life, or
> (b) a relationship formed with a qualifying partner, that is established by a person at a time when the person is in the United Kingdom unlawfully.
> (5) Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.
> (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
> (b) it would not be reasonable to expect the child to leave the United Kingdom.

117C Article 8: additional considerations in cases involving foreign criminals
(1) The deportation of foreign criminals is in the public interest.
(2) The more serious the offence committed by a foreign criminal, the greater is the public interest in deportation of the criminal.
(3) In the case of a foreign criminal ("C") who has not been sentenced to a period of imprisonment of four years or more, the public interest requires C's deportation unless Exception 1 or Exception 2 applies.
(4) Exception 1 applies where—
(a) C has been lawfully resident in the United Kingdom for most of C's life,
(b) C is socially and culturally integrated in the United Kingdom, and
(c) there would be very significant obstacles to C's integration into the country to which C is proposed to be deported.
(5) Exception 2 applies where C has a genuine and subsisting relationship with a qualifying partner, or a genuine and subsisting parental relationship with a qualifying child, and the effect of C's deportation on the partner or child would be unduly harsh.
(6) In the case of a foreign criminal who has been sentenced to a period of imprisonment of at least four years, the public interest requires deportation unless there are very compelling circumstances, over and above those described in Exceptions 1 and 2.
(7) The considerations in subsections (1) to (6) are to be taken into account where a court or tribunal is considering a decision to deport a foreign criminal only to the extent that the reason for the decision was the offence or offences for which the criminal has been convicted.

117D Interpretation of this Part
(1) In this Part—
"Article 8" means Article 8 of the European Convention on Human Rights;
"qualifying child" means a person who is under the age of 18 and who—
(a) is a British citizen, or
(b) has lived in the United Kingdom for a continuous period of seven years or more;
"qualifying partner" means a partner who—
(a) is a British citizen, or
(b) who is settled in the United Kingdom (within the meaning of the Immigration Act 1971 — see section 33(2A) of that Act).
(2) In this Part, "foreign criminal" means a person—
(a) who is not a British citizen,
(b) who has been convicted in the United Kingdom of an offence, and
(c) who—
(i) has been sentenced to a period of imprisonment of at least 12 months,
(ii) has been convicted of an offence that has caused serious harm, or
(iii) is a persistent offender."

Hearing

16. Mrs Petterson, on behalf of the SSHD, submitted that the FTT erred in law in finding that SR was taking an active role in A's upbringing when

notwithstanding the court order, the evidence clearly established there had been no recent contact other than text communications between the parents.

17. Mr Caswell, on behalf of SR, did not seek to rely upon a respondent's notice but submitted that the finding that SR was taking an active role in A's upbringing was open to the FTT in light of the September 2017 court order, the text messages demonstrating SR's continued interest in his child and SR's own evidence to that effect.

18. After hearing from both representatives, I indicated that the FTT finding that SR took an active role in A's upbringing was irrational and inadequately reasoned. Both representatives agreed that I should go on to remake the decision in light of the updated 417-page bundle of evidence.

19. Mr Caswell referred to the bundle and highlighted the important documents within it. Mr Caswell pointed out that since the hearing SR has had fortnightly direct contact with A. This commenced at a contact centre on 3 February 2018 and lasted an hour. This has progressed to fortnightly visits of three hours' duration. In his witness statement SR indicated that contact is progressing well and he has expressed a desire to visit A for longer but her mother is not agreeing to this.

20. Mrs Petterson confirmed that this evidence was not in dispute and she therefore did not wish to cross-examine SR. There were no other witnesses and I then heard submissions from both parties.

21. Mrs Petterson described the contact as limited. She submitted that the evidence of direct contact with A on a fortnightly basis and with her mother by text was not of a nature and frequency to support SR taking an active role in A's upbringing. Mrs Petterson relied upon an older version of the 2018 IDI referred to above (provided to the FTT) to support her submission that direct contact in itself was insufficient and it was necessary to assess the nature and extent of the role SR took in A's upbringing in order to determine whether it is "active" for the purposes of E-LTRPT-2. In relation to Article 8, Mrs Petterson submitted that there was no requirement to undertake any assessment outside the Immigration Rules.

22. Mr Caswell invited me to find that the fortnightly visits were sufficient for there to be an active role. He submitted that this together with SR's level of persistence and genuine wish to be involved in A's life supported him having an active role in her upbringing. He asked me to note that SR wanted more contact but the mother has refused to permit any more.

23. In the alternative, Mr Caswell submitted that if the necessary threshold had not yet been met, it would inevitably be met in the future. As such, SR and A

should be given a practical opportunity to enable their relationship to continue and flourish, and the appeal should therefore be allowed under Article 8.

24. Regrettably, neither representative directed me to a single authority in support of any of their submissions. Unhelpfully, Mr Caswell did not have a copy of the relevant Immigration Rules or the relevant IDIs and his submissions focussed upon the findings of fact he invited me to make. When I pointed out that I would need to apply my findings of fact to the applicable legal framework, he indicated that he was happy for me to do so. I reserved my decision.

DISCUSSION

Error of law

25. It is undisputed that a parent entitled to contact with, or as E-LTRPT.2.4(a)(ii) puts it "access rights" to, his / her child pursuant to a court order may not necessarily be taking "an active role in the child's upbringing" for the purposes of E-LTRPT.2.4(b). As noted in JA it is not uncommon for a parent with a "spend time with" order (i.e. "direct" access) to lose touch with a child entirely whilst a parent with an "otherwise spend time with" (i.e. "indirect" access) order may use it to take an active role in the child's life. E-LTRPT.2.4 recognises this and requires a parent who has direct access with a child for the purposes of (a) to additionally, "provide evidence that they are taking, and intend to continue to take, an active role in the child's upbringing" pursuant to (b). In order for a parent to meet the requirements of (b), all the particular facts will need to be considered in the round, including *inter alia*: the age, and if appropriate the wishes and feelings of the child; the nature and extent of direct and indirect contact between parent and child; its duration; whether the parent has "parental responsibility" and; the nature and extent of the role played in decision-making for the child and his / her upbringing.

26. It is also not disputed that the FTT was entitled to find that there was adequate evidence to support the conclusion that SR had direct access to A pursuant to court order. Rather, Mrs Petterson, on behalf of the SSHD focused her attention upon the finding that SR was playing an active role in A's upbringing. I am satisfied that the FTT judge reached a conclusion that was not reasonably open to her on the evidence available. SR may have held a genuine intention to have a relationship with A but as at the date of hearing there was in fact no such relationship and no meaningful direct or indirect contact (save for the purposes of court reports). Significantly and in any event, there was simply no evidence to support a conclusion that SR was taking an "active role in the child's upbringing". I was not taken to any evidence available to the FTT that the mother involved SR in any of the

important decisions relevant to A's upbringing. The text messages between the parents dealt with more mundane issues such as gifts. As the FTT noted at [14] the text messages showed that SR regularly asked about his child and wanted to know what she was doing. That is not by any standard sufficient to establish that SR took an active role in A's upbringing and in finding otherwise, the FTT has acted irrationally or alternatively failed to provide adequate reasons.

Remaking the decision

Immigration Rules

27. It is not in dispute that SR meets the requirements of R-LTRPT.1.1(a) and (b). The disputed matters turn entirely upon (d). This requires SR to meet: (i) the 'suitability' requirements; (ii) the 'relationship' requirements, and; (iii) EX.1. There is no dispute that SR meets the 'suitability' requirements.

28. In order to meet the 'relationship' requirements of R-LTRPT.1.1(d)(ii), it is necessary to meet 2.2 to 2.4 of E-LTRPT. There is no dispute that the requirements in 2.2 are met because A is under 18, living in the UK and a British citizen. The only disputed issue for the purposes of the 'relationship' requirements is whether SR has been taking and intends to continue to take an active role in A's upbringing. Having considered all the available evidence before me, I am not satisfied that SR meets this requirement when all the circumstances are considered in the round.

29. First, although SR has demonstrated commitment to securing and maintaining contact with A, it remains limited in nature and extent. Contact is limited to three hours on a fortnightly basis. SR is not involved in A's day to day care. A is only three years old and as such contact is taken up with playing and entertaining her. There is very little other contact of an indirect kind such as phone calls. The current arrangement is of recent vintage and has only been on-going for a period of some six months. Prior to this, SR had not seen A since March 2017, save for the purposes of preparing CAFCASS reports. A was not even two years old then and is now only three.

30. Secondly, there appears to be no prospect in the foreseeable future of the nature and extent of the contact increasing. A's mother has demonstrated that she is very reluctant to agree to contact at all far less an increase in contact. The hearing that led to the child arrangements order in September 2017 was contested. Although contact was supposed to commence straight away, it did not begin until February 2018. The evidence demonstrates that the mother has been opposed to contact in principle and reluctant to comply with the order requiring contact in the past. SR has also made it clear in his witness statement that the mother is opposed to any increase in contact.

31. Thirdly, although SR has "parental responsibility", there is no clear and cogent evidence that he plays an active role in making any important decisions regarding A. The test is not whether SR and A have contact which they both enjoy. Mr Caswell did not take me to any evidence in the text messages or otherwise to support a conclusion that SR plays any role in A's upbringing beyond simply seeing her for three hours on a fortnightly basis. The Rules do not define upbringing. The Oxford dictionary definition: "*the way in which a child is cared for and taught how to behave while it is growing up*" and the general sense in which the term is used, requires at least a certain amount of important decision-making as to the way in which the child is cared for. SR's witness statement confirms that he visits A, has a loving relationship with her and gives her gifts. His assertion that he is "*involved in her life and well-being*" is not particularised beyond these matters. His assertion that he "*shall continue to play an active part in [her] life*" fails to explain how he has already taken an active role in her upbringing. There is no independent evidence in the form of a social worker's report or otherwise that describes the role SR has taken in A's upbringing. The CAFCASS reports and contact centre reports focus on whether contact is in A's best interests and how it has progressed. The limited evidence before me supports the finding that it is A's mother who is solely responsible for making every important decision in A's life. SR has not been invited and has not actually played any role in important decision-making regarding A and has not played any active role in her upbringing, for the purposes of the Immigration Rules.

32. SR is unable to meet the 'relationship' requirements of the relevant Immigration Rules. There is therefore no need for me to go on to address EX.1. However, the wording of EX.1. mirrors that in section 117B(6) of the 2002 Act, which I consider in detail below, when I address Article 8.

Article 8

33. Section 117B(6) sets out three requirements which, if met, have the effect that "*the public interest does not require the person's removal*":

    (1) the person "*is not liable to deportation*";

    (2) "*the person has a genuine and subsisting parental relationship with a qualifying child*"; and

    (3) "*it would not be reasonable to expect the child to leave the United Kingdom*".

34. The first strand is met - clearly SR is not liable to deportation. There is no doubt that A is a qualifying child as she is a British citizen under the age of 18 (see section 117D(1) of the 2002 Act). The second strand requires SR to have a genuine and subsisting parental relationship with A, to which I now turn.

35. The assessment of whether there is a "genuine and subsisting parental relationship" for the purposes of EX.1 and section 117B(6)(a) is different in form and substance to whether a parent has taken an "active role" in the child's "upbringing" for the purposes of R-LTRPT1.1. It is possible to have a genuine and subsisting parental relationship with a child, particularly in cases where contact has only recently resumed on a limited basis, but for that relationship not to include the parent playing an active role in the child's upbringing. The fact that SR has not been involved in making important decisions in A's life does not necessarily mean that he has not developed a genuine and subsisting parental relationship. The nature and extent of that relationship requires a consideration of all the factors referred to in RK at [42]. The child's age is also likely to be a relevant factor.

36. In SSHD v VC at [42] Macfarlane LJ accepted the submission (recorded at [27]) that the requirement to establish whether "the person has a genuine and subsisting parental relationship with a child" albeit for another part of the Immigration Rules, namely 399(a), contains four elements: "*(a) a relationship between the child and the foreign criminal; (b) which is 'parental', rather than of some other kind; (c) the relationship must be 'genuine'; and (d) the relationship must be 'subsisting' (in the sense that it exists or has a real existence)*" and that simply to establish biological parentage is insufficient - there must be a genuine existing parental relationship. As Macfarlane LJ observed at [42] "*each of those words denotes a separate and essential element in the quality of relationship…*" and at [43] "*the 'parent' must have a 'subsisting' role in personally providing at least some element of direct parental care to the child*".

37. I have already decided that SR has not been taking an active role in A's upbringing. There is insufficient evidence to support a claim that he has been involved in making any important decisions regarding the way in which she is cared for and taught how to behave. I must still nonetheless consider whether he personally provides at least some element of direct parental care to A. As made clear in SSHD v VC, a biological parental relationship without more, is insufficient. Indeed, as highlighted by Macfarlane LJ, 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.

38. I therefore firstly turn to consider to what extent SR has provided at least some element of direct parental care to A. This is a case that includes factors which, to use the wording of the 2018 IDI, prompt closer scrutiny. The direct contact is only recent in nature and is limited to fortnightly contact for a relatively short period of time, such that A is largely independent of SR and entirely dependent upon her mother for her practical and emotional needs. SR's role in caring for and making decisions in relation to the child is limited to the three-hour contact fortnightly sessions and can at best be described as minor. However, it is undeniable that once a fortnight for a period of three hours, SR

provides A with direct parental care. The level of parental care is obviously limited, but A is only three years old – the care that she currently requires is much more practical and immediate – and SR provides this on a regular basis, albeit for a limited period time and to a much lesser extent than her mother. This has only been ongoing for a relatively short time, but the contact has developed and increased in that time and appears well-placed to continue, subject to SR's immigration position. After all, the current level of contact is sanctioned by court order: SR is her biological father, has parental responsibility and contact has been progressing smoothly and has been assessed to be in A's best interests.

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.

40. I am satisfied that SR has a parental relationship with A and that it is genuine and subsisting for the purposes of section 117B(6)(a). It may be a limited parental relationship but that does not mean it is not genuine or subsisting. SR and A have seen each other on a regular fortnightly basis since February 2018. These are unsupervised sessions that now occur away from a contact centre, in which SR provides A with elements of direct parental care. For that period of time SR is not looking after and directly caring for A in other capacity than as a parent. The independent evidence describing the contact sessions and from CAFCASS support SR's claim that A enjoys contact albeit it is limited given A's age and her mother's reluctance to increase contact. I am satisfied that although SR plays 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.

41. I now turn to the third strand of section 117B(6). The question posed by section 117B(6)(b) is whether it would it be reasonable to expect A to leave the UK. The correct approach to reasonableness in this context is set out in MA (Pakistan) V SSHD [2016] 1 WLR 5093, [2016] EWCA Civ 705. I must determine whether it is reasonable to expect A to leave the UK, in light of all the circumstances. These include her best interests on the one hand and any countervailing circumstances such as the public interest in maintaining immigration control on the other. In other words, the public interest must be balanced against the impact upon the child when assessing reasonableness.

42. The importance of a child's British citizenship was emphasised by the Supreme Court in ZH (Tanzania) v SSHD [2011] UKSC 4. The Supreme Court,

acknowledging that citizenship carried with it both a right of abode and a range of other benefits and advantages, stated that this was likely to mean that it was not in such a child's best interests to leave the UK. British citizenship is a powerful factor in the assessment of proportionality under Article 8 although it is not a trump card. Whilst the views expressed in the Supreme Court were not said in the context of s.117B(6) - which had yet to be enacted - they are of importance when considering whether it is reasonable to expect a child to leave the UK under s.117B(6). Indeed, the importance of a child's British citizenship is reflected in the 2018 IDI set out above.

43. A's best interests overwhelmingly favour remaining in the UK, where she resides with her British citizen mother. It would not be reasonable to expect the mother to relocate to Pakistan: she has not been an enthusiastic support of contact between A and SR and is very likely to be implacably opposed to moving to Pakistan for this reason or any other. The practical reality of the family structure in this case is such that A could not be reasonably expected to leave the UK for Pakistan without her mother. In assessing the reasonableness of A leaving the UK, I must therefore factor in that this would involve a British citizen mother leaving her family and private life in the UK to move to a country she does not wish to reside in, for understandable reasons. This can be contrasted with a family unit in which the parents remain in a relationship - here it is much more likely to be reasonable for a British citizen parent to join his / her partner without any basis to remain in the UK, in his / her country of origin.

44. There has been a very recent determination of A's best interests by the family court. It has been determined that it is in her best interests to have regular direct contact with her father albeit limited to a fortnightly basis for three hours or any other contact that can be agreed between the parties. Direct contact has commenced and will be interrupted by SR's removal. However, A is only three years old and has the love and attention of her mother to support her through any changes to her routine. A can continue to have contact by means of online communications from Pakistan. I appreciate that A is young, but the internet is widely used as a forum for family members to have face to face communications albeit online.

45. On balance, I conclude that the best interests of A, viewed through the lens of Article 8 private life, overwhelmingly favour her and her mother remaining in the UK and marginally favour SR remaining in the UK.

46. I am mindful that the best interests assessment is not determinative. As Elias LJ noted in MA (Pakistan) at [47] even where the child's best interests are to stay, for the purposes of section 117B(6) it may still be not unreasonable to expect the child to leave. That will depend upon a careful analysis of the nature and extent of the links in the UK and in this case, Pakistan, as well as

any other relevant wider considerations relevant to SR – see [45] of MA (Pakistan).

47. I accept that other than not being able to meet the requirements of the Immigration Rules in order to remain in the UK, there are no other public interest factors weighing against SR. His immigration history is not poor as he entered the UK with entry clearance as a student and has remained lawfully since then. His English is adequate. He would like to work if given permission to do so. There are insurmountable obstacles to the parental relationship continuing in its present form in Pakistan. A's mother will not countenance an increase in contact far less the upheaval of her own family and private life from the UK.

48. Having considered all the relevant factors, including A's best interests and the public interest I conclude that it would not be reasonable to expect A to leave the UK.

49. Although the representatives did not refer me to it, I note that since MA (Pakistan) the relevant IDI has been amended. This guidance is concerned with the relevant routes for a partner or parent under Appendix FM and not section 117B(6) specifically. However, as I have already observed, EX.1 is reflected in section 117B(6). The 2018 IDI (pg 74/106) states:

> "The decision maker must consider whether the effect of refusal of the application would be, or would be likely to be, that the child would have to leave the UK. This will not be the case where, in practice, the child will, or is likely to, continue to live in the UK with another parent or primary carer. This will be likely to be the case where for example:
> • the child does not live with the applicant
> • the child's parents are not living together on a permanent basis because the applicant parent has work or other commitments which require them to live apart from their partner and child
> • the child's other parent lives in the UK and the applicant parent has been here as a visitor and therefore undertook to leave the UK at the end of their visit as a condition of their visit visa or leave to enter
>
> If the departure of the non-EEA national parent or carer would not result in the child being required to leave the UK, because the child will (or is likely to) remain living here with another parent or primary carer, then the question of whether it is reasonable to expect the child to leave the UK will not arise. In these circumstances, paragraph EX.1.(a) does not apply.
>
> However, where there is a genuine and subsisting parental relationship between the applicant and the child, the removal of the applicant may still disrupt their relationship with that child. For that reason, the decision maker will still need to consider whether, in the round, removal of the applicant is appropriate in light of all the

circumstances of the case, taking into account the best interests of the child as a primary consideration and the impact on the child of the applicant's departure from the UK. If it is considered that refusal would lead to unjustifiably harsh consequences for the applicant, the child or their family, leave will fall to be granted on the basis of exceptional circumstances."

50. The 2018 IDI therefore appears to indicate that section 117B(6) has "*no application*" to this case as it only applies where the effect of the decision would "*necessitate the qualifying child in question also having to leave the UK*". I reject the argument that section 117B(6) is of no application to this case or as Mrs Petterson put it, it is unnecessary to consider Article 8 outside the Rules. In my judgment, this aspect of the 2018 IDI provides an untenable construction of the plain and ordinary meaning of EX.1. and section 117B(6). As I have already observed, the wording in EX.1 is reflected within section 117B(6) and in so far as the guidance in the 2018 IDI provides the SSHD's position on the correct approach to section 117B(6)(b), I reject it for these reasons.

51. First, it is difficult to see how section 117B(6)(b) can be said to be of no application or to pose a merely hypothetical question. Section 117B(6) dictates whether or not the public interest requires removal where a person not liable to deportation has a genuine and subsisting parental relationship with a qualifying child. The question that must be answered is whether it would not be reasonable to expect the child to leave the UK. That question as contained in statute, cannot be ignored or glossed over. Self-evidently, section 117B(6) is engaged whether the child will or will not in fact or practice leave the UK. It addresses the normative and straightforward question - should the child be "expected to leave" the UK?

52. Secondly, the approach in the 2018 IDI appears to reflect the line of authorities following Case C-34/09 Ruiz Zambrano, [2011] EUECJ C-34/09. Section 117B(6) is not confined to such (EU) cases. It extends to those persons "not liable to deportation". In addition, it self-evidently applies to those who are not EU citizens and can apply to a child who is not a British citizen, but has lived in the UK at least 7 years, to which EU law provides no assistance.

53. Thirdly, although the straightforward construction of section 117B(6)(b) might appear to provide an overly generous approach to those parents with a genuine and subsisting relationship with a British citizen child living with another parent in the UK, but who cannot meet the requirements of the Immigration Rules, it is important to acknowledge the position is markedly different in the deportation context. If a deportation decision had been made against the SR, an altogether different approach would apply. If not sentenced to four years or more imprisonment, the question would be whether or not Exception 2 as contained in section 117C(5) of the 2002 Act applies i.e. would

the effect of SR’s deportation on A be unduly harsh. To use the language of paragraph 399 of the Immigration Rules, although it may present difficulties, it might not be unduly harsh for A to remain in the UK without SR. I need say no more about this because section 117C(5) and paragraph 399 are not relevant to this case.

54. Having considered all the relevant circumstances and weighed the public interest in expecting A to leave the UK in order to enjoy family life with SR (because SR cannot meet the requirements of the Rules), I am satisfied that, to use the wording of section 117B(6), the public interest does not require SR’s removal because it would not be reasonable to expect A to leave the UK.

55. The proper application of section 117B(6) when resolved in an individual's favour is determinative of the issue of proportionality. As Sales LJ made clear in Rhuppiah v SSHD [2016] EWCA Civ 803, [2016] 1 WLR 4204 at [45], sections 117A-117D of the 2002 Act provide a structured approach to the application of Article 8 which produces in all cases a “final result” compatible with Article 8. Where Parliament has declared that the public interest does not require a person’s removal in specified circumstances, and those circumstances are present, that is the end of the matter.

56. For these reasons, I am satisfied that the interference with family life in this case is disproportionate and it follows that the appeal is allowed on Article 8 grounds.

Decision

The FTT decision contains an error of law and is set aside.

I remake the decision by allowing SR’s appeal pursuant to Article 8 of the ECHR.

Signed: *UTJ Plimmer* Dated: 30 August 2018
Ms Melanie Plimmer
Judge of the Upper Tribunal