IAC-FH-CK-V1

Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/20232/2019**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 27 August 2021	**On the 11th October 2021**
Extempore	

Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

MR NASIR IQBAL
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr J Gajjar, Counsel instructed by M A Consultants (Birmingham)
For the Respondent: Mr E Tufan, Home Office Presenting Officer

DECISION AND REASONS

The appellant is a citizen of Pakistan born on 13 March 1983. He appeals under Section 82 of the Nationality, Immigration and Asylum Act 2002 against a decision of the Secretary of State made on 20 November 2019 to refuse his application for leave to remain in the United Kingdom. His appeal against that decision was heard in the First-tier Tribunal on 5 March 2020 and for the reasons set out in the decision of 29 April 2020 that was refused. For the

reasons set out in my decision of 23 October 2020 (a copy of which is annexed) that decision was set aside.

The appellant entered the United Kingdom on 26 September 2013 with a visit visa but remained here without leave and whilst here formed a relationship with Miss Jabeen, who is also a citizen of Pakistan. Miss Jabeen, who I refer to as the sponsor, has a son who is a British citizen from a previous relationship. It is her case that there is no longer any contact with the child's father and it is the appellant's case that he has formed now a parental relationship with the appellant. The family live together and until relatively recently the sponsor was employed.

The Secretary of State's case before the First-tier Tribunal was that the appellant did not meet the requirements of the Immigration Rules nor was it accepted that the appellant had established a parental relationship.

The judge in the First-tier Tribunal made a number of findings. She found that the requirements of the Immigration Rules were not met, which is not challenged, that there was a subsisting relationship between the appellant and the sponsor and that there was a genuine and subsisting relationship, paragraph 18, and that the appellant enjoyed a family life in the United Kingdom with his partner and her son. The judge also found at paragraph 20 that it was in the son's best interests to remain in the United Kingdom and it would be on balance not reasonable to expect him to leave the United Kingdom away from all his ties. The judge did not, however, find that it would be a disproportionate interference with the appellant's right to respect for his family life to leave the United Kingdom and dismissed the appeal on that basis.

The appellant sought permission to appeal against that decision, which was granted on 15 June 2020 by First-tier Tribunal Judge Adio. Subsequent to that the Secretary of State in a letter made pursuant to Rule 24 of the Procedure Rules on 2 September 2020 stated that she did not oppose the application for permission and asked the Tribunal to determine the appeal with a fresh oral decision. It was on that basis that on 23 October 2020 I found that the decision of the First-tier Tribunal involve the making of an error of law, albeit without the need for a hearing. Certain findings of the First-tier Tribunal were preserved, first, that there was a subsisting family life between the appellant, his partner and her son, and identified that it was necessary, however, to consider whether there was a parental relationship between the appellant and his stepson.

I heard evidence from the appellant and the sponsor, both of whom adopted their witness statements and gave evidence with the assistance of a court interpreter. They were both cross-examined by Mr Tufan on behalf of the Secretary of State. I find some of the evidence of the appellant confusing about whether his wife was working or not and the nature of her work. There is unfortunately no documentary evidence as to the nature of her work beyond the payslips but taking their evidence together and looking at it in the round, I accept that she has ceased to work although she did work in the past. The confusion about there being an online company is that I think that the company

fulfilled online orders but the matter is not entirely clear and I do accept the sponsor's evidence that she is not familiar with computers and she was not working in an online capacity but I find that despite some misgivings I might have about the evidence on that point I am satisfied that the relationship subsists and I accept that the sponsor is in receipt of Universal Credit, which would make sense, given that she had previously been employed, which is not in dispute, and she is also in receipt of child benefit, which, again, would be normal in the circumstances.

It is for the appellant to show that his removal from the United Kingdom would be disproportionate in terms of Article 8. It is accepted that he does not meet the requirements of the Immigration Rules and that is the starting point for any assessment of his position with respect to his Article 8 rights. This is a case in which I must have regard to Section 117B of the 2002 Act. The starting point is that the appellant does not meet the requirements of the Immigration Rules. He is here unlawfully and has never had any expectation of being able to stay here. Taking that as a starting point, I consider then whether and how the subparagraphs of Section 117B apply.

First, the starting point would normally be that there is heavy weight to be attached in favour of removal given the failure to meet the requirements of the Immigration Rules. The appellant has not shown much of an ability to speak English nor for that matter is he now financially independent and these are factors which would normally weigh against him. Similarly, private and family life little weight can be attached to, given the terms of Section 117B(4) and 117B(5). The question then turns on Section 117B(6), which requires me to make a finding of fact.

Whether a parental relationship exists between somebody who is not the biological parent and a child is a fact-sensitive matter. There are a number of factors which I take into account. First, it is not in doubt and I accept that the appellant and the sponsor live together as a married couple. I accept also that the child has had no contact with his biological father and I accept the evidence, albeit somewhat unusual, that at the age of 13 he is taken to and from school by the appellant. There is also sufficient evidence in the witness statement evidence of a close relationship between the appellant and his stepson. Factors which would tend to go against that is that it is a relatively recent relationship of some three years but I find, looking at the evidence as a whole, that I am satisfied on a balance of probabilities that a parental relationship does exist between the appellant and his stepson. It follows on that basis that I am satisfied that Section 117B(6) of the 2002 Act applies in this case.

Mr Tufan for the Secretary of State urges me to dismiss the appeal on the basis primarily of the decision in Younas [2020] UKUT 129 on the basis that it would be proportionate to expect the appellant to return to Pakistan and make an application for entry clearance.

The first point to be made about Younas is that it can be distinguished on the basis that the Tribunal in Younas found that Section 117B(6) did not apply,

having found that it had not been established that it was unreasonable to expect the child to leave the United Kingdom. The facts of that case were very different and the child was much younger. Secondly, and perhaps more importantly, as the Tribunal noted in Younas, Section 117B(6) is in effect a standalone provision, that is it is described as self-contained. The discussion in Younas revolves around how a Tribunal should establish whether it is reasonable to expect a child to leave, and they concluded in that case it should. That finding is what distinguishes this appeal.

I turn next to the more recent decision of the Court of Appeal in NA (Bangladesh) [2021] EWCA Civ 953. It is important to note what is said in that case at paragraphs 29 and 30. At paragraph 30 the Court of Appeal, in this case Lord Justice Underhill, with whom Lord Justices Singh and Warby agreed, said:

> "It is important, however, to emphasise that the approach approved by Lord Carnwath in **KO (Nigeria)** does not provide for a presumption in the opposite direction. It represents no more than a common sense starting point adopted for the reasons given at paras 18 to 19 of his judgment. It remains necessary in every case to evaluate all the circumstances in order to establish whether it would be reasonable to expect the child to leave the United Kingdom with his or her parents",

I emphasise the following passage:

> "If the conclusion of the evaluation is that this would not be reasonable, then the hypothesis that the parents will be leaving has to be abandoned and the family as a whole will be entitled to leave to remain. To spell it out, in the case of a qualifying child that will be under paragraph 276ADE(1), in the case of the parents it will be under Article 8, applying Section 117B(6)."

Applying that to this case, I find that as Section 117B(6) is engaged, then there is no public interest in requiring the appellant to leave the United Kingdom. That is because of the express requirement of Section 117B (6). Further, given that there is no public interest, then the factors set out in the remainder of section 117B do not attract materially adverse weight.

Mr Tufan's submissions proceeds on the basis that there is a public interest in removal, and that notwithstanding the preserved finding that section 117B (6) is met, it is still proportionate to remove.

With respect, the fact that Section 117B(6) is met means that there is no public interest in removal and on that basis it is difficult to understand how in the circumstances of this case it could be proportionate, given that whilst the appellant might be able to stay with family in Pakistan, how long he would have to stay there is, given that it is on the Red List, unclear and it is unclear how long it would be before he would be able to be returned. Certainly, it would not be reasonable to require his wife and stepson to go to stay with him in Pakistan, given that for the same reasons it would be difficult for them to live there and to return within any proper period without significant difficulty and certainly, the advice as far as I understand it , the current advice from the UK

Government is that nobody should be going to Pakistan (it being on the Red List) unless there is a very good reason to do so.

Further, the fact that the appellant has a parental relationship with a child who cannot be expected to leave the United Kingdom is, given that section 117B (6) applies, a sufficiently compelling circumstance such that removal would not be proportionate.

For all these reasons and taking into account all the factors relevant within section 117B, I conclude that requiring the appellant to leave the United Kingdom amounts to a disproportionate interference with his Article 8 rights and I allow the appeal on that basis. In conclusion therefore, the decision of the First-tier Tribunal involved the making of an error of law and I set it aside. I remake the decision by allowing the appeal on Article 8 grounds.

Notice of Decision

1. The decision of the First-tier Tribunal involved the making of an error of law and I set it aside.

2. I remake the appeal by allowing the appeal on human rights grounds.

No anonymity direction is made.

Jeremy K H Rintoul
Upper Tribunal Judge Rintoul Date 07 September 2021

ANNEX – ERROR OF LAW DECISION

IAC-AH-SAR-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/20232/2019

THE IMMIGRATION ACTS

Decided under Rule 34 Without a Hearing
At Field House
On 23 October 2020

Decision & Reasons Promulgated

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Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

NASIR IQBAL
(NO ANONYMITY DIRECTION MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

DECISION AND REASONS

1. The appellant appeals with permission against the decision of First-tier Tribunal Judge Phull promulgated on 29 April 2020, dismissing his appeal under the Nationality, Immigration and Asylum Act 2002 against a decision of the respondent made on 20 November 2019 to refuse him leave to remain and his human rights claim.

2. The appellant sought leave to remain on the basis of his relationship with his partner, who is settled her, and her son from an earlier relationship. He is a British Citizen.

3. The judge found [18] that the appellant has established a family life in the United Kingdom with his partner and her son; that it would not be reasonable to expect the son to leave the UK [20] but that removal would be proportionate as the sponsor could go there; or, she could support his application to return.

4. The appellant sought permission to appeal on the grounds that the judge had erred in not making any finding whether there is a parental relationship between the appellant and his partner's son which would be material as if so, then section 117B(6) of the 2002 Act would be engaged; and, having found that it would not be reasonable to expect the son to leave the United Kingdom, erred in her assessment of proportionality.

5. On 29 April 2020, First-tier Tribunal Judge Adio granted permission on all grounds.

6. On 30 July 2020, Upper Tribunal Judge Norton-Taylor gave directions which provided amongst other matters:

    1. I have reviewed the file in this case. In the light of the present need to take precautions against the spread of Covid-19, and the overriding objective expressed in the Procedure Rules[1], I have reached the provisional view, that it would in this case be appropriate to determine the following questions without a hearing:

        (a) whether the making of the First-tier Tribunal's decision involved the making of an error of law, and, if so

        (b) whether that decision should be set aside.

    2. I therefore make the following DIRECTIONS:

        (i) The appellant may submit further submissions in support of the assertion of an error of law, and on the question whether the First-tier Tribunal's decision should be set aside if error of law is found, to be filed and served on all other parties no later than **14 days after this notice is sent out** (the date of sending is on the covering letter or covering email);

        (ii) Any other party may file and serve submissions in response, no later than **21 days after this notice is sent out**;

        (iii) If submissions are made in accordance with paragraph (ii) above the party who sought permission to appeal may file and serve a reply no later than **28 days after this notice is sent out**.

        (iv) All submissions that rely on any document not previously provided to all other parties <u>in electronic form</u> must be accompanied by electronic copies of any such document.

[1] The overriding objective is to enable the Upper Tribunal to deal with cases fairly and justly: rule 2(1) of the Tribunal Procedure (Upper Tribunal) Rules 2008; see also rule 2(2) to (4).

3. Any party **who considers that despite the foregoing directions a hearing is necessary** to consider the questions set out in paragraph 1 (or either of them) above must submit reasons for that view no later than **21 days after this notice is sent out** and they will be taken into account by the Tribunal. The directions in paragraph 2 above must be complied with in every case.

7. On 2 September 2020, the respondent replied stating that she did not oppose the application for permission, and invited the Upper Tribunal to determine the appeal at a further oral hearing to consider whether a parental relationship exists between the appellant and his partner's son.

8. The Tribunal has the power to make the decision without a hearing under Rule 34 of the Procedure Rules. Rule 34(2) requires me to have regard to the views of the parties. Bearing in mind the overriding objective in Rule 2 to enable the Tribunal to deal with cases fairly and justly, and bearing in mind the concession by the respondent, I am satisfied that in the particular circumstances of this case that it would be correct to make a decision being made in the absence of a hearing.

9. I am satisfied that the judge did err in reaching her decision as is claimed in the grounds of appeal and as is accepted by the respondent. The decision clearly involved the making of an error of law as claimed as these errors went to the weight to be attached to the public interest by operation of section 117B(6) of the 2002 Act. That required a finding as to whether a parental relationship exists between the appellant and his partner's son. That error infects the findings on proportionality which must also be set aside. Further, the judge erred in considering that it would be reasonable to expect the appellant's partner to go back to Pakistan, given the finding made that it would not be reasonable to expect her son to leave the United Kingdom.

10. I consider that the findings as to family life made by Judge Phull can be preserved. It will, however, be necessary for the Upper Tribunal to make findings as to whether there exists a parental relationship between the appellant and his partner's son and to make fresh findings as to proportionality in any event, given the finding that it would not be reasonable to expect the appellant's partner's son to leave the United Kingdom.

Notice of Decision & Directions

1. The decision of the First-tier Tribunal did involve the making of an error of law and I set it aside.

2. The appeal will be remade in the Upper Tribunal on a date to be fixed.

3. Having regard to the Pilot Practice Direction and the UTIAC Guidance Note No 1 of 2020, the Upper Tribunal is provisionally of the view that the

forthcoming hearing in this appeal can and should be held face-to-face on a date to be fixed as it may be necessary to have further oral evidence via a court interpreter.

4. Any party wishing to adduce further evidence must serve it at least 10 working days before the next hearing, accompanied by an application made pursuant to rule 15 (2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008 explaining why it should be permitted

Signed Date 23 October 2020

Jeremy K H Rintoul
Upper Tribunal Judge Rintoul