



**Upper Tribunal
(Immigration and Asylum Chamber)
HU/03264/2018**

Appeal Number:

THE IMMIGRATION ACTS

**Heard at Manchester CJC
On 17 September 2018**

**Decision & Reasons Promulgated
On 01 October 2018**

Before

**DR H H STOREY
JUDGE OF THE UPPER TRIBUNAL**

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**MR MOHAMMAD SULEMAN
(ANONYMITY DIRECTION NOT MADE)**

Respondent

Representation:

For the Appellant: Mr A Tan, Home Office Presenting Officer
For the Respondent: Mr S Els, Counsel, instructed by Mamoon Solicitors

DECISION AND REASONS

1. In a decision sent on 22 May 2018 Judge Brookfield of the First-tier Tribunal allowed the appeal of the respondent (hereafter the claimant) on Article 8 grounds, stating at paragraph 8(x) that:

“8(x) The respondent has a duty to control immigration into the UK for the legitimate purpose of the protection of the economic well being of the United Kingdom and for the protection of the rights and freedoms of others through operation of the Immigration Rules. Derogation from that duty would affect all citizens living in the UK. I am not aware that Article 8 is a

mechanism to be used to circumvent the Immigration Rules. The respondent's published policy indicates that where the child is a British citizen, it will not be reasonable to expect them to leave the UK with the applicant parent or primary carer facing removal. In this case the appellant's son will not be required to leave the UK with the appellant, but would be able to remain in the UK with his mother, who is his primary carer. I accept the appellant would be able to resume the contact and family life he enjoyed with his son in the past on his return to Pakistan and his son would be able to visit his father there. I noted that this family elected to live separate from each other until the appellant came to the UK as a visitor in 2013. However, given that the appellant's son will not reach his majority until January of next year, I find it would be unreasonable to remove the appellant whilst his son remains a minor. I conclude that the removal of the appellant from the UK before his son attains his majority would constitute a disproportionate interference with his rights under Article 8 of the ECHR. I allow the human rights appeal."

2. The appellant's (hereafter the Secretary of State's or SSHD's) grounds contend that this conclusion was contrary to the judge's own findings of fact which included that: the relationship between the claimant and his wife had ended; there was no protected family life between the claimant and his adult children; the claimant does not meet the requirements of the Immigration Rules on the basis of his relationship with his youngest child; the youngest child would not be required to leave the UK as a result of the SSHD's decision; the decision does not interfere with the current care arrangements of the youngest child; it is in the best interests of the child to remain in the UK with his mother and the SSHD's decision does not interfere with that; the decision does not breach s.55; the appellant would be able to resume contact with his son by way of the son visiting Pakistan; and the family had elected to live separately from each other until the claimant came to the UK as a visitor in 2013.
3. I have no hesitation in finding that the judge's decision is vitiated by legal error. The only effective reason given for allowing the appeal in paragraph 8(x) was that the claimant had contact with his son who was still a minor. Furthermore, on the basis of the judge's other findings (in particular that the claimant did not live with his son or have any contact rights in relation to him, that the son's best interests were served by him remaining in the UK with his mother), it was clearly doubtful whether the nature of the claimant's contact with his son was sufficiently strong or significant enough to warrant a grant of stay. The fact that on the judge's own findings the family life existing between the claimant and the son could be continued in the form of visits (see 8(vii)) only compounded the irrationality of the decision to find the decision disproportionate solely on the basis of the fact that there was regular contact between the claimant and his son. Put another way, even if the judge accepted that there was family life between the claimant and his youngest son and that there was some degree of parental relationship, he clearly did not consider that this

tie had a strong factual content. On the judge's own findings it was not a relationship in which they lived together or in which the child's best interests required the presence of the claimant in the UK. At paragraph 8(vii) the judge held:

"8(vii) In this case, the respondent's decision does not interfere with the current arrangements for the care of the appellant's son who would remain living in the UK with his mother, who is his primary carer. There would be no interruption of his education and he would continue to be able to enjoy the stability and continuity of social, educational and healthcare provisions and the benefit of growing up in the UK that he has enjoyed in the past. He would be able to enjoy contact with his father in Pakistan, as he did up until five years ago. He would be able to visit his father in Pakistan and his father would be able to apply to visit his son in the UK, as he has in the past. I find the best interests of the appellant's son are served by his remaining in the UK with his mother and that the respondent's decision does not interfere with this. I find the respondent's decision does not violate Section 55 of the Borders, Citizenship and Immigration Act 2009."

4. I raised with the parties whether, even if I find the judge's decision legally flawed, it would be because of material legal error. I had in mind that although the judge clearly did not in paragraph 8(x) identify the respondent's policy as a basis for allowing the appeal, it might be argued that that policy benefits the claimant since he is the parent of a British citizen. The fatal difficulty with this argument (as Mr Els himself conceded when contrasting it with the respondent's pre-February 2018 version of this policy) is that it clearly does not consider that the mere fact of parenthood qualifies the parent of a British citizen child for leave to remain. The policy the judge had to apply was that revised on 22 February 2018. At pages 72-73 of that policy it is stated:

"Is the child a British citizen or have they lived in the UK for a continuous period of at least seven years?"

The decision maker should establish from the application or claim the age and nationality of each child affected by the decision. Where the child is a foreign national, the decision maker should establish their immigration history in the UK (for example how long have they lived in the UK and where they lived before).

In establishing whether a non-British citizen child has lived in the UK continuously for at least the seven years immediately preceding the date of application, the decision maker should include time spent in the UK with and without valid leave.

Short periods outside the UK – for example for holidays or family visits – would not count as a break in the continuous period of at least

seven years required. However, where a child has spent more than six months out of the UK at any one time, this will normally count as a break in continuous residence unless any exceptional factors apply.

Will the consequence of refusal of the application be that the child is required to leave the UK?

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.

If the decision maker is minded to refuse an application in circumstances in which the applicant would then be separated from a child in the UK, this decision should normally be discussed with a senior caseworker."

5. This policy clearly regards the quality of the relationship between a parent and a child as a highly material matter to the case worker's assessment. Accordingly, I am entirely satisfied that the judge materially erred in law.

6. I turn to consider whether I am in a position to re-make the decision without further ado. I have concluded that I am. There is no dispute as to the judge's primary findings of fact; only as to their evaluation. No further evidence has been adduced by the claimant. There is no dispute in this case that there is an existing family life between the claimant and his youngest son. Whilst it is not entirely clear why the judge accepted that there was regular contact between the claimant and his son (the mother's statement said there was not), I am prepared to decide the case on the basis that there was regular contact. I must also take into account the correspondence evidence in which, inter alia, the youngest son expresses the importance to him of his relationship with his father.
7. However, the judge's findings of fact as set out earlier are entirely consistent with this correspondence evidence and on the basis of those findings, particularly those set out at paragraph 8(vii), it simply cannot reasonably be said that the SSHD's decision amounted to a disproportionate interference with the right to respect for private life. The claimant could not succeed under the Immigration Rules. The best interests of the British citizen child lay in remaining in the UK (as he was entitled to do in any event). He was living with his mother who was his court-recognised primary carer. On the judge's own findings of fact, the relationship between the claimant and his youngest son could be adequately sustained in the form of visits by the son to the claimant in Pakistan. The claimant's removal would not therefore significantly disrupt their relationship. The claimant did not and does not stand to benefit from the Home Office policy precisely because he was not and is not the primary carer and does not live with the youngest son and his removal will not significantly disrupt their relationship.

8. For the above reasons I conclude that:

The FtT Judge materially erred in law.

The decision I re-make is to dismiss the appellant's appeal.

No anonymity direction is made.

Signed:

Date: 26 September 2018



Dr H H Storey
Judge of the Upper Tribunal