



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: HU/06680/2016

THE IMMIGRATION ACTS

**Heard at Glasgow
On 8 March 2019**

**Decision & Reasons
Promulgated
On 14th March 2019**

Before

UPPER TRIBUNAL JUDGE MACLEMAN

Between

K

and

Appellant

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

For the Appellant: Mr A Caskie, Advocate, instructed by Livingstone Brown,
Solicitors
For the Respondent: Mr A Govan, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. On 20 October 2015 the appellant, a citizen of Pakistan, applied for leave to remain in the UK, based on family life as a parent.
2. The appellant has a son, born in June 2011, but no relationship with him.

3. From a second marriage, the appellant has two daughters, born in January 2013 and June 2014, with whom he does claim to have a relationship.
4. The SSHD refused his application by a letter dated 24 February 2016. As to the immigration rules, the key reasons are at page 3: no “direct access in person and ... not maintaining contact” with the children; no evidence of proceedings to obtain a contact order; “not accepted ... you are taking, and intend to continue to take, an active role” in the children’s upbringing.
5. On article 8 ECHR, outside the rules, the key reasons are at page 5: no proceedings commenced; an obligation to pay child maintenance, but that could be paid from Pakistan; no exceptional circumstances.
6. FtT Judge Wylie heard the appeal on 19 October 2018 and dismissed it by a decision promulgated on 1 November 2018. By that time, as stated at [34] of the decision, the appellant had taken proceedings in the Sheriff Court, and had recently been granted contact once a month for one hour at a supervised contact centre.
7. Judge Wylie held that the appellant could not satisfy the requirements of the rules on an active role in the children’s upbringing, and that the human rights grounds could not be met through the medium of the rules. The appellant does not dispute that.
8. Mr Caskie submitted that there was obvious error of law, through absence of an assessment of the best interests of the children, and error in finding there to be no genuine and subsisting relationship with the children.
9. The finding of no relationship was key to the outcome under section 117B(6) of the 2002 Act. The two children live with their mother and older half-siblings, all of whom appear to be UK citizens. The SSHD did not suggest in the refusal letter or in the FtT, and could not reasonably suggest, that the children could be expected to leave the UK. A finding of a genuine and subsisting relationship would have determined proportionality, and the appeal would have succeeded.
10. The FtT recorded at [53] that the Sheriff found in her judgement (dated 3 September 2018) that contact was in the best interests of the children. It would have taken strong further evidence for the FtT to decide, very shortly afterwards, anything but that it was in their interests for him to remain in the UK for that purpose. To what extent, of course, would be another question.
11. The FtT observed at [53] that the Sheriff had to take the welfare of the children as paramount, and held at [56] that as the children did not have a subsisting relationship with the appellant, his removal would be proportionate.
12. That might be read as a finding that the benefit to the children was so minor as not to tip the scales, bearing in mind that for the FtT their best

interests were primary but not paramount. However, such an important issue should have been resolved explicitly.

13. The appellant had a relationship with the two children from birth at least until July 2015. The FtT says at several points that the relationship did not exist at the date of the hearing [46, 49, 50, 56]. At [49] it is stressed that the relationship must be in the present, not looking to the future. For the FtT to be right, the relationship must at some date have been extinguished, and any future relationship would be a new one.
14. It cannot be that any interruption to a relationship brings it to an end. An unjustified refusal by one parent to allow contact with the other surely does not have that immediate effect. The question must be one of fact and degree, according to the circumstances of each case.
15. The FtT's decision on relationship would be supportable if the appellant's family litigation had been entirely cynical, as the FtT hints at [48]. However, that does not sit well with [37], where the FtT records the Sheriff's finding that while the desire to remain in the UK had a significant part to play, the appellant "is also motivated by a desire to maintain a relationship" with the children. The FtT judge observed in the same paragraph that he had "shown some commitment to the children".
16. Taking proper account of the Sheriff's judgment, the FtT might have found the relationship between the appellant and his children to be weak, but given his active interest in maintaining it, I do not think the FtT was entitled to find it non-existent.
17. The FtT's decision is set aside, for the errors of (a) absence of a finding (or of a sufficiently explicit and clear finding) on the best interests of the children, and (b) a finding of no relationship, which was not supported by the evidence.
18. Parties agreed that if the decision were to be set aside, the UT should proceed to remake it.
19. The relevant updating information is not disputed, and is as follows. The appellant says that he has made arrangements for supervised contact, including payment of fees, but all efforts have been ignored by his wife, who is failing to comply with the order of the Court. He produces a copy of his summary application for her to appear before the Court to explain, or to be held in contempt. A proof on the application is expected to take place in April 2019.
20. It is usually in the interests of children to have relationships and contact with both parents. The Sheriff Court has found it in the interests of the children to have contact with the appellant. He does not appear to have delayed in his attempts to establish that contact. It is in their interests that he should remain here at least until that matter is resolved.

21. Given the whole of the Sheriff's findings, the likely benefit to the children from contact with the appellant may not be much; but the extent of their benefit is not the decisive issue.

22. On the evidence to date, the appellant continues to have a relationship with the children. It may be weak, and it is not one of direct current contact, but it is genuine and subsisting. That is enough for the appeal, as originally brought to the FtT, to be allowed.
23. No anonymity direction was made in the FtT, and none was requested in the UT. However, the matter relates to family proceedings involving young children. While this decision does not include any details the revelation of which might be significantly injurious to their welfare, I consider that an order is preferable.
24. 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 both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

A handwritten signature in black ink, appearing to read "Hugh Macleman". The signature is written in a cursive style with a large, stylized initial "H".

12 March 2019
UT Judge Macleman