



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/17938/2019

THE IMMIGRATION ACTS

Heard at Bradford (via Microsoft Teams)
On 4 June 2021

Decision promulgated
On 22 June 2021

Before

UPPER TRIBUNAL JUDGE HANSON

Between

SYED AJAZ UL HASSAN NAQVI
(Anonymity direction not made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms Waqas, Public Access Barrister.

For the Respondent: Mr Diwnycz, Senior Home Office Presenting Officer.

DECISION AND REASONS

1. The appellant appeals with permission a decision of First-tier Tribunal Judge T.R. Smith ('the Judge') promulgated on 29 January 2020 in which the Judge dismissed the appellant's appeal against the refusal of his application for leave to remain in the United Kingdom on human rights grounds on the basis of his family life with his partner Mrs Bibi.

2. The appellant is a citizen of Pakistan born on 12 February 1972. The Judge notes at [17] that the appellant's representative conceded that he could not satisfy the provisions of the Immigration Rules and that the core issue in the case was the proportionality of the respondent's decision pursuant to Article 8 ECHR.
3. The Judge sets out findings of fact from [33] of the decision under challenge before setting out conclusions and legal analysis from [81].
4. The Judge gives considerable weight to the fact that the appellant cannot meet the requirements of the Immigration Rules for continuing his family life in the United Kingdom [87]. The Judge confirms that in order to assess the proportionality of the decision he has adopted a balance sheet exercise [89], setting out the factors both for and against the appellant in the following terms:

95. The following factors weighed against the Appellant.

96. The first, and a significant factor, is the Appellant does not satisfy the Immigration Rules which are drafted in a manner that seeks to address a person's right under Article 8 of the ECHR. The maintenance of effective immigration control is a factor that I must take into account in assessing the public interest. This is a weighty factor against the Appellant. Allied to the first factor is that those who do not comply with the Immigration Rules and seek to "jump the queue" should not benefit over those who are seeking to enter the United Kingdom lawfully.

97. The second is both the Appellant and Mrs Bibi knew when they entered into their Islamic marriage that the Appellant's position in the United Kingdom was precarious. It was therefore always known to both parties that the Appellant was a real risk of being removed from the United Kingdom. Allied to this the Appellant has never sought, until recently, to seek to regularise his immigration status before 2018 despite knowing he had no right to remain. I am careful not to double count this factor with the "precarious" factor.

98. Thirdly the Appellant does not speak English, or if he does was not confident enough to do so and use the Tribunal appointed interpreter. This is a factor that I required to take into account.

99. Fourthly I am satisfied that the Appellant can integrate into Pakistan, a country he knows well, and whilst I accept that he may not have qualifications, that is not an impediment to him working, though perhaps not in highly paid employment. Having said that, on the appellant's case, if he was allowed to stay the only job prospect he had was as a shop assistant in a convenience store.

100. The Appellant has not been dependent upon state benefits but this is not a positive factor, but nor is it a negative factor. I regard it as a neutral factor in my balancing exercise.

101. Balanced against the above factors is that the removal of the Appellant will lead to a very significant impact upon the Appellant's family life with Mrs Bibi. Whilst there are options of electronic communication that is not the same as a genuine loving relationship and is no substitute for one. Mrs Bibi has visited Pakistan on a number of occasions and whether her fear of her former husband in Pakistan is realistic, I do accept she has a subjective fear. That said, she was able to visit Pakistan with the help of the Pakistani High Commission and there is nothing before me to say but could not be done in the future, although I accept permanent protection would not be available. I also accept that visits are not of the same quality as enjoying day-to-day family life.

102. The Appellant has clearly provided some support for Mrs Bibi and I would accept that has probably resulted in an improvement in her mental health. If the Appellant was to be removed

that improvement would probably be adversely impacted, although I have no medical evidence to suggest that the extent of that impact. I can, however, I think, reasonably infer that it would have an adverse impact. Balanced against that she would be remaining in the United Kingdom close to her children and with a host of friends in the community who would support her as is evidenced by the numerous statements placed before me. She also would have the benefit of the National Health Service and her concerns as to her son and his OCD would be assuaged by the fact that she could choose to remain in the United Kingdom with him to offer support.

103. I also have to factor in that the separation of the family. I do not find it would have a significant effect upon her children.

104. I have considered the effect of my order on the qualifying child, Mr Kazmi, but for the reasons already given I regard his best interests are to remain in the United Kingdom and do not find he will be significantly impacted on by the removal of the Appellant.

105. I also find that on the information before me it is unlikely that Mrs Bibi will satisfy the Immigration Rules in the immediate future (although there are in my judgement prospects that she will obtain employment) such that she would be able to successfully sponsor the Appellant to enter the United Kingdom immediately.

106. I also consider that as the Appellant has been an overstayer if he was to apply for a visit Visa it may well be refused.

107. Thus, on the one hand I have important public policy considerations and on the other if I refuse the appeal it is likely the Appellant's family life will be significantly impacted if not destroyed. I have not discounted the fact that his private life will be affected.

108. The case is finely balanced but having carefully weighed the above factors I find the requirements of the Immigration rules are not met and weighing all the evidence in the round the refusal by the Respondent is not a disproportionate interference with the Appellant's Article 8 rights on the basis of the evidence presented to me.

5. The appellant sought permission to appeal, which was granted by another judge of the First-tier Tribunal the operative part of the grant being in the following terms:

2. The grounds submit, in terms, that the appeal hearing was unfair because the judge had to attend a training session in the south of England and had to catch a train later that day, additionally that there was no cross examination of the sponsors 17 year old son, or of the appellant about their relationship consequently the finding that the appellant does not have a genuine and subsisting parental relationship with the sponsors 17 year old son is unfair.

3. I have read the Record of Proceedings. The appeal was called on at 12.10 and concluded at 13.15. All witnesses were cross-examined, and in the case of the son about his biological father and when he had last seen him. There is nothing in the Record of Proceedings to support the submission that the proceedings were unfair.

4. The main thrust of the grounds is that the judge arguably erred in law in failing to conclude that the appellant has a genuine and subsisting parental relationship with the sponsors son (age 17) which had not been challenged by the Respondent and which enables the appellant to succeed under EX.1 because the Judge had also found it was not reasonable to expect the appellant son to leave the United Kingdom.

5. The grounds may be argued.

6. In her Rule 24 response dated 12 October 2020 the Secretary State opposes the appeal noting, *inter-alia*, that Counsel for the appellant conceded that the appellant could not meet the Immigration Rules and that the Home Office Presenting Officer did not accept that the appellant had a genuine and subsisting parental relationship with Mr Kazim, the 17-year-old son of the appellant's partner from a previous relationship who referred to the appellant as his "uncle". It is stated the Judge gives adequate reasons for finding the appellant did not have a genuine and subsisting parental relationship with Mr Kazmi and that it was open to the Judge to conclude that the appellant's removal would not have a significant impact upon Mr Kazmi.
7. The respondent asserts the Judge did not err in the interpretation of the report from Professor Bluth and nor did the Judge err in the approach to article 8 ECHR.

Error of law

8. Ms Waqas accepted in her submissions to the Upper Tribunal that the concession that the appellant could not satisfy the requirements of the Immigration Rules was made at the hearing before the Judge, at which she represented the appellant, but claimed that such should not have been made and that she was effectively seeking to resile from the same at this stage.
9. It is clear that the Judge did not consider on the evidence that that concession had been wrongly made. The claim made in submissions that the Judge should not have accepted the concession but should have gone on to consider whether the appellant satisfied the Immigration Rules is noted, as is the overriding principle to be considered of fairness in such a case. If a concession is made which is clearly wrong in fact and in law the appellant should be able to withdraw the same. It is therefore necessary to consider if the concession is wrong.
10. The Judge finds the appellant is unable to satisfy a number of requirements of Appendix FM including the minimal financial requirements. Notwithstanding this the Rule provides that leave to enter or remain can be granted if there are exceptional circumstances. The meaning of "exceptional circumstances" can be found in various paragraphs of the Rules and the appellant was required to show that the refusal to grant leave to remain would be a breach of article 8 ECHR because it would result in "unjustifiably harsh consequences" for the appellant, his partner, a child or another family member involved.
11. To succeed under the Rules, the appellant must satisfy suitability and eligibility criteria some of which are applicable even if pleading exceptional circumstances.
12. The eligibility criteria include:
 - the relationship between the appellant and his partner,
 - the appellants status in the UK (in case of an application for leave to remain),

- maintenance and accommodation, and
 - knowledge of the English language.
13. The Immigration Rules deal with exceptional circumstances in two parts of Appendix FM, the first is in paragraphs Gen 3.1-3.3. Gen 3.2 was specifically referred to by the Judge at [88] and it is not suggested in the grounds that the appellant can succeed under these provisions.
 14. The second is in Section EX:1 - Exceptions to certain eligibility requirements for leave to remain as a partner or parent.
 15. Paragraph EX.1(a) deals with cases where the appellant has a “genuine and subsisting parental relationship” with a child who is under 18, in the UK and is British or has lived in the UK continuously for at least the 7 years immediately preceding the date of application.
 16. In this appeal the relevant child is Mr Kazmi who was born on 20 March 2002 who was 17 years of age at the date of the hearing, and who is now 18 and therefore now an adult.
 17. It is asserted the Judge erred in not finding there was a genuine and subsisting relationship between Mr Kazmi and the appellant. It was not disputed by the Judge that it was not reasonable to expect the child to leave the UK at the date of the hearing.
 18. Ms Waqas asserts the Judge should have considered AB & AO [2019] EWCA Civ 661 and R (on the application of RK v Secretary of State for the Home Department (S.117B(6); “parental relationship”) IJR [2016 UKUT 31 (IAC) when deciding this issue.
 19. In R (on the application of RK) (s.117B(6); “parental relationship”) IJR [2016] UKUT 00031 in the context of section 117B it was held that (i) It is not necessary for an individual to have “parental responsibility” in law for there to exist a parental relationship; (ii) Whether a person who is not a biological parent is in a “parental relationship” with a child for the purposes of s.117B(6) of the Nationality, Immigration and Asylum Act 2002 depends on the individual circumstances and whether the role that individual plays establishes he or she has “stepped into the shoes” of a parent; (iii) Applying that approach, apart from the situation of split families where relationships between parents have broken down and an actual or de facto step-parent exists, it will be unusual, but not impossible, for more than two individuals to have a “parental relationship” with a child. However, the relationships between a child and professional or voluntary carers or family friends are not “parental relationships”.
 20. In SSHD v VC (Sri Lanka) [2017] EWCA Civ 1967 it was said, in the context of the older immigration rules relating to deportation i.e. where there was an exception where there was no family member other than the foreign criminal available to care for the child in the UK, that to have a “genuine and subsisting parental relationship” the parent must have a “subsisting” role in personally providing at least some element of direct parental care to the child. The Court of Appeal also held that each of the words

- “genuine”, “subsisting” and “parental” referred to a separate and essential quality of the relationship.
21. In *SSHD v AB (Jamaica) and AO (Nigeria)* [2019] EWCA Civ 661 Singh LJ held that the words “genuine and subsisting parental relationship” were words of the English language and no further gloss should be put on them. King LJ gave some useful pointers in her judgment (although she misquoted (or at least the judgment does) the words of the statute as “genuine and substantial parental relationship”). Where a parent was seeing a child on a regular basis in an unsupervised setting it was hard to see how he could not have the necessary relationship; but equally an order for direct contact was not conclusive; the parent might only take up the contact unreliably or infrequently. Although it might be more likely that a tribunal conclude that there is no relationship of the right quality where there is only indirect contact, that is not inevitable. It might be that there has been a long gap in contact and this is a reintroduction or a parent is showing commitment to indirect contact necessary before direct contact can be reintroduced.
22. Specific reference is made by Ms Wasif to [20] of her skeleton argument where it is written:
20. The Appellant has described the delicate relationship he has with the child due to the background of what has occurred in relation to his biological father. The Appellant plays an active role in the child’s life including an authoritative role i.e. setting boundaries. The FTT makes no reference to the Appellant’s witness statement. Absolutely no weight is given to the Appellant’s account for what role he plays in the child’s life. The Appellant states at para 9 of his witness statement: *“We do have the odd days where he is mood but that is him being a teenager and we relax the boundaries with him as he is immature for his age. Sahil has OCD. He is constantly in the bathroom washing himself. He is very particular in how things are kept and maintained in the home. I would describe his behaviour as difficult but as parents you have unconditional love for your children so you don’t mind handling such issues. I along with Doulat spend a long time trying to get him up and out of the house. Doulat gets tired so I carry on with the clock countdown to hurry him along for college. I will often make his toast which Doulat gives to him on the car journey.”* This clearly shows the Appellant has embraced “parenthood”, enjoying the family unit and togetherness by eating as a family together. In the circumstances, it is unreasonable for the Judge to find that the Appellant did not enjoy a genuine and subsisting parental relationship. Simply that the child only devoted one paragraph to the Appellant is insufficient to find there is no parental relationship. Thereby, falling in to error in application of the law.
23. The Judge considered the evidence with the required degree of anxious scrutiny and it was accepted by Ms Waqas that the Judge was not required to set out all the evidence in the decision under challenge.

24. It was submitted on the appellant's behalf that at [19] of the reasons for refusal letter the respondent conceded the issue where it is written, "*it is accepted that you have a qualifying relationship contained within EX.1. and therefore meet the requirements of R-LTRP.1.1.(d)(iii)* but that provision of the rules clearly relates to applications for limited leave to remain as a partner and does not specify in clear terms that this relates to Mr Kazmi.
25. The Judge accepts Mr Kazmi is a qualifying child as he is a British citizen but at [45 – 46], writes:
45. He does not have a genuine and subsisting relationship with the Appellant, his relationship mainly centred on his mother. It is his mother who makes all the significant decisions for him. It is his mother who encouraged him with his studies. It is his mother who takes him to college because he is frequently late due to excessive washing in the morning. It is his mother managing benefits that support him. It is noticeable in his statement that he said he couldn't imagine life without "*my mum*". Mr Kazmi in a paragraph devoted to the Appellant simply said he did not find him annoying and he was given space, which he respected. He didn't speak much to the Appellant. He was comfortable with his own routine and was happy that his mother was happy.
46. I find his best interests would be to remain in the United Kingdom, staying at the moment with Mrs Bibi until he decides to leave home, and continue to receive treatment for his OCD. I have also taken into account his own wishes and the fact he is a British-born national with strong links to the United Kingdom. As I've already stated it was not Mrs Fell's case that the Mrs Bibi and Mr Kazmi should accompany the Appellant, if he was removed.
26. Notwithstanding the phraseology in the above paragraphs and others within the determination not at times reading as they should, the Judges meaning and findings can be clearly understood.
27. In her original witness statement, notwithstanding that the appellant had lived in the same household as his wife for a number of years, the appellant's wife Mrs Bibby when referring to her son, writes:
15. My son Mohammed Sahil Kazmi is 17 years old and is currently living with me and is studying a BTEC Media course at Shipley College. I feel that the ongoing problems within the home when we lived as a 'family unit' has definitely had a negative impact upon him. He has got extreme OCD. He takes 2 hours in the bathroom in the morning where he repeatedly washes his hands, face, legs and feet. I have taken him to numerous appointments to try and get him help. He struggles with social interactions and due to his father's behaviour towards me he gives me very little respect. I wash his underwear and socks separately from the family washing it's only recently sometimes when he suspects I haven't he will wash them again. I have tried to place responsibility on him but feel he is immature. He is not able to manage finances, his self-care, getting to College and has great mood swings.
16. In the morning, the Appellant and I, begin to wake him up from 7 AM and I am constantly telling him to come out of bathroom and get ready for College. His breakfast is often given to him in the car as I drop him to College as it is at least 30 mins away. The Appellant comes with us on occasions and is a great amount of support. My son behaves respectfully when the Appellant is around. I have

noticed the positives effect, the Appellant has on his behaviour. Each day is a struggle with him and I worry about his whereabouts as he is out of the house majority of the time. I am successful in keeping tabs on him as I am very scared that he will fall in to bad company. Bradford is renowned for drugs, guns, violence and poor youth behaviour. If I or the Appellant are am not around I know he will begin to associate with criminals and will end up becoming a criminal. I would estimate that my son is mentally functioning at a much lower age, but you will not accept any form of help as he is in denial that there is 'anything wrong'. He is naïve and foolish, but only it was time, support and care he learned to grasp how to behave like an adult. I have spoken to the teachers at school without my son knowing, but they states there is little they can do if he is not accepting he has an issue. That is why there is no formal diagnosis as he refuses to meet any professionals to undertake a formal assessment.

28. The above content confirms the Judge's findings in relation to the main carer of Mr Kazmi as his mother and the predominant role she takes in meeting his needs. Whilst there is mention of the appellant on one occasion, there was insufficient evidence of a parental relationship between him and this young man who, according to his mother, would not appear to want one in any event as he will not accept help from any source.
29. It is also the case, as noted in the grant of permission, that all the witnesses were cross-examined, including Mr Kazmi and the opportunity therefore given to explore in detail the nature of the appellant's relationship with this young man. But despite the appellant providing all the written and oral evidence he was seeking to rely upon it was not made out before the Judge that the reality of the situation is that the appellant does have a genuine and subsisting parental relationship as it was not shown the role the appellant plays established he has "stepped into the shoes" of a parent.
30. The Judges findings were arrived at having had the benefit of seeing and hearing oral evidence being given and considering the weight to be given to that evidence. The conclusion reached as a result of that exercise has not been shown to be a finding outside the range of those reasonably available to the Judge. The question of whether such a relationship exists is fact specific.
31. It was pleaded in the alternative that if the appellant cannot succeed on this ground then he wishes to challenge the proportionality assessment.
32. The Judge considered the proportionality of the decision in a properly structured manner undertaking the required balancing exercise. In such a situation it is necessary for the appellant to establish a public law ground of challenge. When asked about such issues Ms Waqas submitted the overall conclusion as to proportionality is irrational, namely that no right-thinking judge fully appraised of the facts would have come to the conclusion that this judge did.
33. I find such a submission fails to establish arguable legal error material to the decision. Even though the Judge proceeded on the basis of the concession that had been made that does not make the proportionality assessment wrong when an assessment of the evidence without the benefit of the concession shows that the Judge's finding the appellant does not have a genuine and subsisting parental relationship with Mr Kazmi is a finding clearly open to the Judge on

the evidence, meaning the requirements of EX.1 cannot be met. This in fact makes the concession arguably legally correct.

34. The Judge was entitled to give appropriate weight to the fact the appellant could not meet the requirements of the Immigration Rules under either Appendix FM, paragraph GEN 3.1 to 3.3, or in any other basis. The Judge was clearly aware of the impact of the appellant's removal on the family, which is incorporated into the balancing exercise.
35. The Judge says this is a finely balanced decision and what is not made out is that such a conclusion is either irrational, perverse, unlawful, or unfair when the evidence is considered as a whole. On the facts are found it is actually more likely that the majority of judges in the first-tier Tribunal would have come to the same conclusion. The fact another judge may have come to a different conclusion is not the relevant test as we have been recently reminded by the Court of Appeal.
36. Whilst the appellant and other family members disagree with the Judge's conclusion and seek to reargue the merits of the appeal, the grounds fail to establish arguable legal error material to the decision to dismiss the appeal sufficient to warrant the Upper Tribunal interfering any further in this matter.

Decision

37. **There is no material error of law in the Immigration Judge's decision. The determination shall stand.**

Anonymity.

38. The First-tier Tribunal made no order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I make no such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed.....

Upper Tribunal Judge Hanson

Dated 8 June 2021