Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/09091/2019

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
Remotely via Microsoft Teams	**On 7th January 2022**
On 23rd November 2021	

Before

UPPER TRIBUNAL JUDGE RIMINGTON

Between

MAC (BANGLADESH)
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr S Karim, Counsel, instructed by Syed Shaheen Solicitors
For the Respondent: Mr D Clarke, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appeals with permission against the decision of First-tier Tribunal Judge Moon (the judge), who dismissed the appellant's appeal against the Secretary of State's decision to refuse his application for indefinite leave to remain (dated 29th November 2018) on 7th March 2019.

2. The reasons for refusal recorded that the appellant entered the UK on 21st February 2009 as a Tier 4 (General) Student, and his leave was extended

until 28th February 2014. On 24th February 2014 the appellant made a further application for leave as a Tier 4 Student dependent on his spouse and that application was granted with valid leave until 15th September 2015. On the same date the appellant's then wife (they are now separated) applied for further leave to remain with the appellant listed as her dependant and on 17th November 2015 the appellant applied for an EEA residence card as a non-EEA national extended family member. That application for an EEA residence card was refused on 10th July 2016.

The judge's decision and findings

3. At paragraph 3 of the judge's determination she details that the respondent's records showed that on 21st December 2015 a request was made to withdraw the application made on 15th September 2015 and this request was actioned on 24th December 2015. It was the appellant's position that he did not request that the application dated 15th September 2015 be withdrawn but that the respondent simply never responded to his application. As such, he has had valid leave to remain in the United Kingdom since 21st February 2009 and met paragraph 276B of the Immigration Rules because he has ten years' continuous lawful residence. His position is that his leave was extended since the application was made on 15th September 2015 by virtue of Section 3C of the Immigration Act 1971. He also submits that there would be very significant obstacles to his integration into Bangladesh given the time he had spent in the United Kingdom.

4. As the judge recorded, in the alternative it was submitted that refusal would amount to a disproportionate interference with the appellant's right to his family life because of the effect that it would have on his 4 year old daughter who lives in the United Kingdom and his relationship would not be able to be replicated from abroad through video calls.

5. The judge recorded that the child had been subject to Children Act proceedings, and it was confirmed that permission for disclosure of relevant documents to the Immigration Tribunal had been granted by the letter of 14th February 2020.

6. The judge was concerned, as recorded at paragraph 19, that the Tribunal did not have a clear and full picture of the issues concerning the appellant's family. As the judge recorded at paragraph 51, the way that the documents connected to the Family Court proceedings had been disclosed, the background and events surrounding the placing of the appellant's daughter into the care of the local authority were not clear. It appeared that from the final care plan the appellant's daughter was admitted to hospital in May 2019, but the reason was not known.

7. The judge recorded at paragraph 41:

> *"The appellant's witness statement dated 13th August 2019 states that when his wife was in hospital, he wanted to look after his*

daughter and had proposed a number of friends who could help him but the local authority placed his daughter in foster care on 4th April 2019. By the time the appellant prepared his second witness statement on 3rd November 2019, his wife was still in hospital."

8. The judge proceeded to record also at paragraph 50:

"The Family Court has made an order for the appellant to spend time with his daughter on a supervised basis at a contact centre. … I have noted from the contact observation notes that initially the appellant may not have been accepted on the positive changes course because he may not have taken responsibility for his actions."

The judge added at paragraph 54:

"Whilst I accept that the Family Court could have ordered less contact, it is also true to say that it was also open to the Family Court to place the appellant's child with the appellant when her mother was admitted to hospital, just as it was open to the Family Court to make an order for the appellant to have unsupervised or overnight contact. The inference I draw is that the Family Court has identified a risk of harm which is being managed by contact taking place on a supervised basis within a contact centre."

9. The judge noted at paragraph 53 that the Family Court was in the best position to determine the child's best interests and at 58 that those best interests were that it was to have direct contact with the appellant "but for reasons which the Tribunal has not been made fully aware of, there are restrictions on this time". The judge added again that "the full details of the appellant's family history is not known". The judge also made a finding that the child had now been returned to the care of her mother, who was recovering from her mental health difficulties, and "there remain concerns in relation to the appellant's controlling behaviour over his wife".

10. The judge dismissed the appeal.

The grounds for permission to appeal were in essence:-

(i) The judge erred in her approach to the evidence on the 'withdrawal' on 21st 21st December 2015 of the application

(ii) The judge applied too high a test to the prospect of contact from abroad, gave inadequate reasoning as to how contact could progress and inadequate explanation as to whether there was family life, failed to assess unjustifiably harsh consequences on the child, failed to engage with relevant evidence (the careplan) and failed to consider the child's best interests and failed to give balance sheet approach and proceeded on an error of fact in that the mother and child now had formally been given leave

(iii) in dealing with paragraph 276ADE(1)(vi) the judge failed to apply the test in **Secretary of State v Kamara** [2016] EWCA Civ 813. The judge also failed to consider the effect on the appellant owing to the separation from the child and whether he would be able to operate on a day to day basis in the absence of his daughter.

Ground 1

11. The grounds for permission to appeal set out that in relation to paragraph 276B and the long residence criteria the critical issue was whether the earlier 'in time' application of 15th September 2015 had been withdrawn. The judge found that it was so withdrawn because the surname was the same as the appellant and his wife as recorded in the respondent's CID note, but the surname was not the same because the spelling was different, that is the second 'h' was missing from C******** and the issue about the surname was never put to the appellant and was therefore procedurally unfair. Secondly, the surname C******** was very common. Thirdly, the judge offered no explanation for why the first name is completely different from the appellant and his wife's first names, referring to Munmum. Fourthly, the judge was wrong to conclude at paragraph 26 that the burden was on the appellant. As the respondent had asserted that the application was withdrawn, they should prove that.

12. The First-tier Tribunal Judge pointed to the fact it was the wife's application and that only the appellant's wife could withdraw the application of 15th September 2015 and not the appellant as he was simply a dependant. The judge had failed to engage with the immigration history document prepared by Mr I Yeboah of the respondent which was before the judge, and which recorded that Mr C [the appellant] emailed the respondent on 21st December 2015 requesting the application be withdrawn and repeated on 24th December 2015.

13. At the hearing before me I refused the application from Mr Clarke to submit further evidence under Rule 15(2A) which he said would clarify the situation as to whether ground 1 was made out. Mr Karim objected to the admission of that evidence and, as I pointed out, this was rather more a **Ladd v Marshall** than a Rule 15(2A) application as the evidence had not been before the First-tier Tribunal but was in the possession of the Secretary of State. Mr Karim submitted that should Mr Clarke be permitted to submit this document he wished to put in a statement from the appellant's ex-wife. I refused both applications.

14. Mr Karim submitted that nothing in the GCID note mentioned a telephone call being made and, on the chronology, it referred to an email being sent but that referred to a Mr C******** requesting a withdrawal.

15. Mr Clarke submitted that looking at the singular CID document which the judge considered at paragraph 26 of his decision, all of the entries relating to the withdrawal were specific to the wife and the appellant would need to show that these were erroneously placed on the CID database. This would require a mistake on the basis of an entry of data in relation to the wife. It was quite possible that an 'h' might have been omitted when writing up notes. The text from Mr Yeboah was not part of the CID notes and simply an error.

16. I find no merit in this ground. The judge addressed the issue in detail from paragraphs 23 to 27.

17. She acknowledged Mr Karim's submission that the application could have only been withdrawn on the appellant's wife's instructions. A point was made in submissions to me that the CID states that the person who made contact was not the name of the appellant nor his wife and there was no telephone call. As the judge identified, it was *Mr Karim's* submission in relation to someone making a telephone call albeit she clearly inadvertently refers to that later. The CID notes put in the bundle before me showed that there was an *email* which recorded that the applicant "wishes to withdraw this application and vary leave to the EEA application" and that a refund of the fee was requested. The judge noted this text and this history as part of her reasoning and indeed observed this was in line with the history of the application because an EEA application had indeed been made. This further tied the withdrawal to the correct CID note. The judge found the surname to be correct, albeit that an 'h' was missing, and as recorded by the judge, the details in the CID notes strongly indicate that there was an email from the correct person withdrawing the application.

18. I find that it was entirely open to the judge in this context to find that the application was withdrawn upon instruction by the wife. The fact is that the appellant himself denies that he made any withdrawal which in turn is consistent with the CID note. The judge found that although the application was difficult to read in places, the judge agreed that the

"*CID clearly states that it is the applicant who wished to withdraw the application rather than the dependant*".

19. The documents were before both parties and the submissions made in the grounds in relation to the 'h' in the surname and the commonness of the surname could have been made to the First-tier Tribunal but apparently were not. The judge looked at all the evidence in the round. That the judge did not appreciate that the surname C******** is very common takes the matter no further forward; in relation to the evidence including the omission of an 'h' in the name C********, it is not for the judge to put to the appellant every single query and argument. There was no procedural unfairness in this instance. As confirmed in **R (Iran) [2005] EWCA Civ 982** at paragraph 13 that '*there is no duty on [an adjudicator], in giving*

his reasons, to deal with every argument presented by [an advocate] in support of his case'.

20. The judge specifically recorded that the appellant maintained it was not he the appellant, who withdrew the application and thus was fully aware and must have taken into account that the reference in Mr Yeboah's chronology to 'Mr C********' that is to the appellant himself was not correct. This document was also a secondary source and did not form part of the contemporary CID notes.

21. From the consolidated file placed before me showing the respondent's documents that were placed before the First-tier Tribunal, it was clear that this case note referred to the appellant's ex-wife, KIC [my anonymisation], and the appellant. Even the reference to the 'call' by the judge, in my view therefore demonstrates no material error.

22. Bearing in mind the production of the CID notes, which provides evidential proof of withdrawal, it was open to the judge to find that the burden of proof was on the appellant to explain those CID notes. Overall, the judge looked at the matter but stated she was satisfied that it was more likely than not that the person named as the applicant requested that the application be withdrawn. Email addresses can vary widely and the use of Munmum does not necessarily indicate that was the wife's first name and the email address was incorrect.

23. I find no error of law in the decision in relation to ground 1.

Ground 2

24. The appellant asserted that the judge had before her the evidence of the Family Court order and the local authority's care plan showing the appellant had twice weekly supervised face-to-face contact with his child, and he had also provided the care centre reports. It was submitted that although the judge appreciated that the Family Court order usually reflected the child's best interests the judge made two fundamental errors including (a) referring to the fact that it would not be "impossible" to progress contact from Bangladesh, which applied too high a test and materially affected consideration of the relevant factors test and (b) the judge did not explain how in the absence of face-to-face contact the appellant could progress further contact with his child.

25. The judge did not assess whether the removal of the appellant would have unjustifiably harsh consequences on the child and the appellant, given the very positive and glowing reports from the contact centre. The judge had failed to make adequate findings in this regard, especially with regard to the consequences on the child if the father was physically absent.

26. It was not clear whether the judge accepted any family life, which clearly existed, and there were inadequate findings on material aspects of the relationship as was clear from the contact centre reports as to how the

appellant can cook and feed his daughter and teach her life skills and give her hugs.

27. The judge had engaged in speculation at paragraph 58 in concluding that the child was likely to have suffered from some trauma causing emotional harm and it was unclear where the judge had obtained this conclusion from, and the judge had erred in failing to determine whether the removal would exacerbate the child's emotional wellbeing.

28. The care plan showed that the appellant was needed to implement the care plan and that the child's mother had promoted contact between the child and the appellant.

29. There had been an inadequate consideration of the child's wishes as per **Abdul (section 55 - Article 24(3) Charter : Nigeria) [2016] UKUT 106 (IAC)**.

30. There was insufficient balance sheet approach as per **Hesham Ali [2016] UKSC 60.**

31. It was also submitted that the child and mother had been given formal leave to remain and there was a mistake of fact on the basis of the judge that there was a pending application, that was an error of law. Under the **Ladd v Marshall** principles this new evidence, that is of the mother and child's status, could be considered.

32. In his oral submissions Mr Karim expanded on his written grounds that the judge has not considered the final order of HHJ Reardon on 12th November 2020. I did ask what would be unjustifiably harsh consequences on the child, bearing in mind she did not live with the father, and Mr Karim responded that the child had a meaningful relationship with the father and there was now face-to-face contact which would cease.

33. Mr Karim also submitted that it was unusual that the Rules did not cater for this type of situation where the child only had limited leave to remain.

34. Mr Clarke responded that the second ground did not engage with the problems being faced by the judge regarding her concerns on the lack of candour as to the history of the appellant and his ex-wife and the child and why the child was not placed with the appellant when the mother had been taken into hospital and had such a long period of supervised contact order imposed upon him. At paragraph 19 the judge noted there was an absence of documents regarding the family history and the allusions to domestic violence which was not set out by the appellant in any way. From paragraphs 41 to 46 the judge had recorded that the local authority had put the child into care, the judge had alluded to the fragmentation of documents, the judge had noted the twice weekly contact and the disruption, and that the appellant had had to attend a Positive Change course in relation to his behaviour. In particular, the judge had referred to a children's guardian expressing concern in relation to the appellant

"asserting power and control over [the appellant's wife]", (AB 206). That was a red flag. When addressing the point of the consideration of the final care plan it was clear that the child was not able to express her own views because of her young age. The appellant has face-to-face contact and nothing else. It could not be said that the judge did not take into account the positive elements of contact and it was not incumbent upon the judge to go through line by line the care reports. It was clear that the judge proceeded on the basis that the child would remain in the UK and to suggest that in some way there should be a different Immigration Rule was unhelpful. The judge quite fairly put this case at its highest. It should be noted that two years' supervised contact is a very long time.

35. The fact is there was a lack of documentary evidence setting out why the child was in care and why the mother was sectioned. It stated that the judge was speculative at paragraph 52, but this contained a direct reference to the care plan. With respect to the domestic violence there was no evidence why the child was having difficulties and any reasonable observer would draw poor inferences. The finding on the risk of harm made by the judge at paragraph 54 was not challenged in the grounds of appeal and there was no express challenge to the fact that the appellant posed a risk. At paragraph 56 the judge accepted that face-to-face contact was not the same as video contact and this consideration appears entirely to have been ignored by the grounds. The increased contact as identified at paragraph 59 would depend on, as the judge stated, a number of uncertainties such as the progression with the "positive changes course". That would be subject to further court orders. At paragraph 61 the judge was looking forward and there was nothing wrong with that.

36. In my view it is wholly unsustainable to suggest that the judge failed to take into account the final order of 12th November 2020 specifying supervised contact. It is specifically referred to at paragraph 42 and threaded throughout the decision. The care report for contact record templates date from 3rd May 2019 and are clearly a record of the supervised contact of the appellant with his daughter. At paragraph 43 the judge identified that supervised direct contact resumed on 16th February 2021. The judge noted that the two years was a prolonged period of time for contact to take place under those conditions. The judge acknowledged the submissions made by Mr Karim in relation to the direct contact which could not be replicated by remote means at paragraph 56 and realised when writing that "if the appellant were removed to Bangladesh this would I find have an impact on the quality of his contact with his daughter". It is evident from this that the judge has taken into account the nature of the quality of the contact.

37. I am not persuaded that the judge applied too high a test when referring to it not being "impossible" to progress contact from Bangladesh at paragraph 60. The judge, in fact, went on to state that it "would be possible for him to continue a relationship with his daughter from abroad (although this would be more difficult)" and that was a finding that was

open to her. That was the correct test. The fact is there was uncertainty as to the progression of the appellant's contact with his daughter. The judge did set out the factors that were in the appellant's favour and considered whether the relationship with his daughter outweighed the weight to be attached to the Immigration Rules as per **Hesham Ali** and noted that the appellant must have taken responsibility for the findings made against him, otherwise he would not have been accepted onto the Positive Changes course and that he was taking steps to address his concerning behaviour.

38. Although it was submitted that the removal of the appellant would have unjustifiably harsh consequences on the child and the judge failed to explain this, bearing in mind the judge had recorded that the child lived with the mother and would require support from Social Services to do so and bearing in mind despite the reports from the contact centre that the judge found the contact had been supervised for two years, it was not clear what the unjustifiably harsh consequences on the child would be. The findings are adequate in this regard. In particular, the judge was concerned as spelled out at paragraph 58 that:

> *"The Family Court has decided that it is in the child's best interests to have direct contact with the appellant but for reasons which the Tribunal has not been made fully aware of there are restrictions on this time. The appellant can do so for four hours a week and his contact is supervised basis in a contact centre. The full details of the appellant's family history is not known."*

39. It is not arguable that the judge failed to be clear that there was a family life and that was quite evident from the formal contact order, bearing in mind the appellant is the child's father. There are clear findings of a relationship throughout the decision and the judge was clearly aware that it was in the child's best interests to have a good relationship with both parents and at paragraph 56 the judge acknowledged the shortcomings of video contact when finding that:

> *"Face-to-face is simply not the same as video contact. Emotional warmth cannot be expressed in the same way and it is particularly difficult for younger children, such as the appellant's child, to remain engaged with a family member on a screen for very long. If the appellant were removed to Bangladesh this would, I find have an impact on the quality of his contact with his daughter."*

40. The judge did not speculate at paragraph 58 that the child was likely to have suffered some trauma causing emotional harm because at paragraph 52 the judge records that the care plan also refers to the time when the appellant's daughter was

> *"first placed in foster care, it is reported that she would sit completely still and silent on the sofa only moving her eyes from side to side, this presentation was considered to be 'indicative of trauma given that*

she was selectively mute, not eating solids, not chewing, showed no emotions, no facial expressions with a straight face'".

41. Although it is asserted that the judge failed to engage with the care plan that (1) the appellant was needed to implement the care plan and (2) the mother had promoted contact between the child and the appellant that criticism of the decision is not sustainable. It is clear that at paragraph 52 the judge has engaged directly with the care plan and the reference to the appellant's ex-wife having "promoted contact" could merely mean that she had complied with the contact order as she would be obliged to do. The appellant is needed to implement the care plan only insofar as he complies with the contact arrangements. That takes the case no further forward.

42. As Mr Clarke pointed out, the consideration of the child's wishes must have been appreciated by the judge, albeit she is so young, by the reference to the fact that "the Family Court has decided that it is in the child's best interests to have direct contact with the appellant". The judge clearly engaged with the supervised contact records which recorded the response of the child to the supervised contact.

43. It is not arguable that the judge proceeded on an erroneous basis as to the leave of the mother and child because as recorded at paragraph 49 the judge proceeded on the basis that the child would remain in the United Kingdom because this "has the greater impact on the appellant's relationship with his daughter".

44. A balance sheet approach is recommended, and it is not clear that it is omitted in this decision. What is criticised by the judge, quite fairly, is the lack of documentation provided by the appellant and the lack of full details of the appellant's family history. Indeed, as the judge states:

> *"Before the final order dated 12th November 2020 an order had been made for the appellant to spend time with his daughter at a contact centre twice a week and that his time was to be supervised. This particular order setting out the terms of the appellant's contact, is one of the documents which has not been made available to the Tribunal."*

45. The care plan is a relatively short document dated 19th November 2020 and the judge has clearly taken it into account. I note that when addressing placement details it states that "the overall aim is for R to continue to have a permanent stable and nurturing placement with her mother until she reaches adulthood". Those are undeniably the best interests of the child set out. Without a clear picture of the family history the judge was entitled to conclude that the relationship with the child remotely would not have unjustifiably harsh consequences as demanded by **R (Agyarko)** [2017] UKSC 11. The judge had serious concerns about the history of the appellant's relationship with the mother and child which

were expressed throughout the determination. Overall having considered the decision carefully I found Mr Clarke's observations well made.

46. I find there is no error of law in relation to the judge's approach to the best interests of the child and the relationship with the father.

Ground 3

47. It was asserted that in dealing with paragraph 276ADE(1)(vi) of the Rules the judge failed to apply the relevant legal tests as set out in **Kamara [2016] EWCA Civ 813**. It was asserted that the judge in the determination at paragraph 34 simply considered whether there were meaningful ties, which is not the correct legal test, and ignored the difficulty he would face including the effect on him of the separation from his daughter.

48. This ground is not sustainable. The test set out in **Kamara** for integration calls for a broad evaluative judgment of whether the individual would be enough of an insider in terms of understanding how life in the other country is conducted and whether the appellant would have a reasonable opportunity to be accepted. That is what the judge did.

49. As pointed out in the decision at the hearing, the appellant needed an interpreter, entered the UK at the age of 39 from Bangladesh and paragraphs 29 and 30 of the decision set out that the appellant was educated to a master's degree level at the Anglia Ruskin University, but that he had worked in Bangladesh for a non-governmental organisation and worked in the UK. The judge recorded when the appellant entered the UK, which was in February 2009, and rejected the appellant's assertion at paragraph 30 that his age and long years of relocation from Bangladesh would mean that he was unable to return and find work. She did not accept his assertion without any independent evidence that he would be unable to get a job. Secretary of State v R (Kaur) [2018] EWCA Civ 1423 para [57] has confirmed that bare assertion is insufficient. The judge found the reverse and indeed at paragraph 33 that the appellant's parents were said to have passed away but the contact reports (of which the judge was supposed to not have read and engaged with) revealed that the appellant worried about his mother who was ill in Bangladesh. The judge also found that the appellant had other family in Bangladesh and still had meaningful contacts there. A broad evaluative assessment was clearly made.

50. The judge also made a careful assessment of the relationship of the appellant with his child within the determination and it should be remembered, as the judge noted at paragraph 57, that it is the best interests of the child which are the primary consideration, **ZH (Tanzania)** [2011] UKSC 4. The uncertainty of the progression of the contact, the fact that the respondent had to take responsibility for the findings made against him (owing to the positive changes course), the judge acknowledged that it would be more difficult to conduct a relationship from abroad, and clearly factored in the appellant's relationship with his

daughter when considering his private life but concluded that she was 'unable to find that the appellant's relationship with his daughter outweighs the considerable public interest in maintaining effective immigration control'. That was open to her. To suggest that the appellant could not function in the absence of the daughter as the grounds suggest, omit the reality that the appellant at the date of hearing had supervised contact twice per week.

51. The judge clearly and properly set out the factors in favour and against the appellant's appeal and concluded that there were not very significant obstacles to the appellant's integration in Bangladesh and a lack of unjustifiably harsh consequences on removal. Her observations and conclusions could not be criticised. A balance sheet approach is not obligatory but in this case the judge took into account relevant material and applied the correct tests and approached the evidence appropriately.

52. I find no material error of law in the decision, and it shall stand. The appellant's appeal remains dismissed.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

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. This direction is given because there are family proceedings and a minor involved.

Signed Helen Rimington Date 23rd December 2021

Upper Tribunal Judge Rimington