Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/16672/2016

THE IMMIGRATION ACTS

Heard at Birmingham CJC	**Decision & Reasons Promulgated**
On 8 November 2018	**On 6 December 2018**

Before

DR H H STOREY
JUDGE OF THE UPPER TRIBUNAL

Between

SHAKEEB KHAN
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr R Khan, Khirri Solicitors
For the Respondent: Mr C Bates, Home Office Presenting Officer

DECISION AND DIRECTIONS

1. The appellant, a citizen of Pakistan, has permission to challenge the decision of Judge Hopkins of the First-tier Tribunal sent on 12 July 2017 dismissing his appeal against the decision made by the respondent on 23 June 2016 refusing him leave to remain.
2. I need not set out the grounds in any detail because both parties were in agreement with me that the judge materially erred in law. The root problem with the judge's decision relates to what he stated at paragraphs 25-27:

> "25. I appreciate that the Appellant's appeal is on the broad ground that the decision is unlawful under section 6 of the Human Rights Act 1998. In particular, his case is that it infringes his right to respect for his family life under Article 8 of the European Convention on Human Rights ('ECHR'). The Respondent was aware at the time of the decision that he has a son who is a British citizen and he has always claimed that he has a family life with him. However, the appeal before me is against a specific decision to refuse his application for leave to remain as a partner. The question whether he should instead have been leave as a parent was not considered by the Secretary of State. The Appellant may have a family life with his son. Were he required to leave the UK following the refusal of leave, this would interfere with such family life. However, I find that it would not be disproportionate to the need for effective immigration control to expect him to make a separate application to the Secretary of State for leave to remain as the parent of a British child.
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> 26. I indicated at the hearing that I was minded to decide the appeal on that basis. I heard no oral evidence from the Appellant and I make no findings on any matters that might be said to be in dispute. I reach no conclusion as to whether or not the Appellant received from the Secretary of State a request for further evidence or whether at the time of the decision his marriage was subsisting. In any event, none of this is likely to be relevant now, since it is accepted that the relationship between the Appellant and his wife has come to an end as at the present time. I note that the Appellant asserts that he has an ongoing committed relationship with his son in the UK, but, given my conclusion that he would have to make a new application on that basis, I consider it is unnecessary to make any finding as to whether or not he has proved that this is the case.
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> 27. During the hearing I had some discussion with Mr Riaz Khan as to whether an application by the Appellant for leave to remain as a parent would meet all the relevant requirements of the Immigration Rules, since the Appellant is still married to his wife, although he is separated from her. It is unnecessary for me to come to any conclusion about that. Even if he does not meet them, there is nothing to stop the Appellant applying to the Respondent for leave to remain outside the Rules."

3. The error of the judge in the above paragraphs was twofold. First, the respondent's refusal decision chose to consider his case under the Immigration Rule relating to parents, namely EX.1. (see page 5) and also considered the matter of the appellant's claimed parental relationship with a British citizen child when considering his Article 8 circumstances outside the Rules. Accordingly the appellant was entitled to challenge those parts of the respondent's decision. Second, the appellant's application constituted a human rights claim and by virtue of Section 6 of the Human Rights Act 1998 was entitled to have a decision as to whether the respondent's refusal breached his Article 8 rights. As Mr Bates highlighted, it was also incumbent on the judge to consider the appellant's Article 8 circumstances as at the date of hearing. The matter of the

appellant's claimed parental relationship with his child was not, as the judge stated, a "new matter subject to the procedure laid down in s. 85 of the NIAA 2002".

4. The judge's error was plainly material and necessitates that I set it aside.

5. Both parties were of the view that the case should be remitted to the FtT. I agree with them. By virtue of the judge's self-denying ordinance no assessment was made as to the context of the appellant's relationship with his child and as to whether it was genuine or not. It will be necessary for the FtT to hear evidence regarding that matter, in addition to needing to address legal submissions as to whether or not the appellant stood to benefit from Home Office policy regarding parents of British citizen children – policy presently being revisited in the light of the Supreme Court decision in **KO** [2018] UKSC

6. I also agree with the parties, however, that the next judge can treat as preserved the judge's finding that the appellant and his spouse are no longer in a genuine and subsisting relationship.

7. To conclude:

   The decision of the FtT Judge is set aside for material error of law;

   the case is remitted to the FtT (not before Judge Hopkins).

   No anonymity direction is made.

Signed Date:1 December 2018

H H Storey

Dr H H Storey
Judge of the Upper Tribunal