Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/15467/2016

THE IMMIGRATION ACTS

Heard at Birmingham Civil Justice Centre	**Decision & Reasons Promulgated**
On 13 November 2018	**On 15 January 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE I A LEWIS

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

N H
(ANONYMITY DIRECTION MADE)

Respondent

Representation:
For the Appellant: Mr D Mills, Home Office Presenting Officer
For the Respondent: Ms K Smith of Counsel instructed by Paragon Law

DECISION AND REASONS

1. This is an appeal against the decision of First-tier Tribunal Judge Law promulgated on 17 August 2017 in which he allowed on Article 8 grounds the appeal of NH against a decision of the Secretary of State for the Home Department dated 14 June 2016 refusing leave to remain.

2. Although before me the Secretary of State for the Home Department is the Appellant and NH is the Respondent, for the sake of consistency with the

proceedings before the First-tier Tribunal I shall hereafter refer to NH as the Appellant and the Secretary of State as the Respondent.

3. The Appellant is a citizen of Pakistan born on 23 December 1986. His immigration history and the background to the case is adequately summarised at paragraphs 1-4 of the decision of the First-tier Tribunal. Essentially, the Appellant had entered the United Kingdom as a student in July 2010, and had thereafter been granted subsequent periods of leave as a student up until 29 November 2016. In or about September 2015 he made an application to vary his leave so that he could remain as a spouse, but this was refused on financial grounds on 28 October 2015. Shortly after, on 16 December 2015, a curtailment decision was taken with effect from 19 February 2016. Although not expressly specified in the materials before me, it would appear that the curtailment decision was taken because the Respondent decided that the Appellant had used a 'proxy tester' to obtain an English language certificate pursuant to a test conducted on 17 July 2013. The certificate had been submitted in support of an application for variation of leave to remain made on 14 August 2013.

4. Following receipt of the curtailment decision the Appellant made an application on 10 February 2016 for further leave to remain on the basis of family life with a partner. In this context, the Appellant - as he had in his previous application of September 2015 – relied on his marriage to SZ, a British citizen born on 16 April 1987. The couple were married on 25 February 2015. At the time of the application it was said that the Appellant and his wife were living with the Appellant's parents and younger brother in the United Kingdom, and that SZ was expecting their first child. In due course, on 2 April 2016, SZ was delivered of a son M. There is no dispute that M is indeed the son of the Appellant.

5. The Appellant's application for leave to remain on Article 8 grounds was refused by the Respondent for reasons set out in a 'reasons for refusal' letter ('RFRL') of 14 June 2016. Essentially, the Respondent considered that the Appellant failed to satisfy the requirements of the Immigration Rules by reference to the suitability criteria by reason of his submission of a false English language certificate in the course of an earlier application for leave to remain.

6. The Appellant appealed to the IAC.

7. At the appeal hearing before the First-tier Tribunal the Appellant revealed a change of domestic circumstances - although such change is not overtly apparent on the face either of his witness statement signed on 11 August

2017, or the written skeleton argument submitted on his behalf before the First-tier Tribunal signed by Counsel on 10 August 2017.

8. The witness statement's primary focus is on the allegation of using a proxy tester in the course of attaining an English language certificate. There is a single paragraph in respect of the Appellant's domestic circumstances which is in these terms:

> *"I wish to reside in the UK based on my private family life with my child who is 1 years of age"*.

It may be seen that no reference is specifically made to his relationship with his wife at that point.

9. Similarly, in the skeleton argument section 117B(6) of the Nationality, Immigration and Asylum Act 2002 is pleaded and it is asserted *"there is no public interest in A's removal. Given that his child is a qualifying child there is a genuine and subsisting relationship and removal would not be reasonable*".

10. Beyond those references there is no additional detail in either the witness statement, the skeleton argument, or indeed any of the supporting documents that were filed before the First-tier Tribunal in respect of the Appellant's domestic circumstances and/or his relationship with his child.

11. However, it is apparent that during the course of oral evidence the Appellant informed the Tribunal that his domestic circumstances had indeed altered. At paragraph 6 the following is recorded:

> "*His wife has now returned to live with her parents and he was living with his parents and trying to obtain contact with his child through court proceedings; the last time he had seen his child was six months ago at a family funeral. The child had been born on 2 April 2016*".

On that basis it may be seen that the Appellant had not seen his child since the child had been approximately 10 months old.

12. In respect of the reference to contact proceedings, as I have detailed above, there was nothing by way of documentary evidence to support the notion that any such proceedings were actually in process.

13. Be that as it may, necessarily it may be seen that the Appellant's claim on the basis of family life and/or Article 8 had shifted in focus. He was no longer relying upon a subsisting marital relationship. Additionally, the

issue over the English language certificate - and thereby the past use of deception - remained 'live' before the First-tier Tribunal.

14. The First-tier Tribunal Judge resolved the certificate / decpetion issue against the Appellant: see the conclusion set out at paragraph 20. Although the appeal before me is an appeal brought by the Secretary of State, there has been no challenge raised by way of a Rule 24 response or otherwise to the Judge's findings in respect of the English language certificate. To this extent that particular aspect of the Judge's decision is unchallenged by either party.

15. However, the First-tier Tribunal Judge allowed the Appellant's appeal on Article 8 grounds with reference to the Appellant's relationship with his son.

16. The Secretary of State for the Home Department applied for permission to appeal which was granted by First-tier Tribunal Judge Kimnell on 31 January 2018. In granting permission to appeal Judge Kimnell made the following observation:

> "*The appeal was allowed because it was found to be disproportionate to refuse leave to enable the Appellant to seek contact with his child through the Family Court. There was however no detail of any court proceedings in relation to the child (paragraph 30). The only facts of which the Judge heard oral evidence from the Appellant was that the child lives with his mother and the Appellant has not seen him for six months. Arguably it is an error to find the public interest is outweighed by such flimsy evidence*".

17. I have already noted above the nature and quality of the evidence - indeed the general lack of evidence in respect of the Appellant's relationship with his son and any contact proceedings. The key passages in the decision where the Judge looks at this aspect of the case are at paragraph 6 (which I have already quoted above), and paragraph 30:

> "*There is of course no prospect of the Appellant's child being required to leave the UK since he is a British citizen. Other than the age of that child, the fact that he lives with his mother and that the Appellant has not seen him for six months, I have no information. The Appellant said that he was seeking contact with his child through court proceedings, but again I have no details. I am proceeding on the basis that the Appellant as the father of a minor child, has family life with that child*".

18. It seems to me that that was an inappropriate assumption. In any event, what the Judge had to consider was the nature and extent of any subsisting relationship. The Judge gives some consideration to this later in the decision at paragraphs 33-35. In the context of section 117B(6) the Judge states "*I find that the Appellant does have a parental relationship with him*" (paragraph 35). This finding was seemingly reached in reliance upon **R (on the application of RK) (s.117B(6); "parental relationship") IJR [2016] UKUT 00031** wherein it was held there that there was no necessity to have parental responsibility in order for there to exist a parental relationship.

19. The problem with the Judge's approach and evaluation is that he does not consider section 117B(6) in its fullest context. Section 117B(6) specifies in its premise that "*the person has a genuine and subsisting parental relationship with a qualifying child*". The Judge fails to consider or evaluate the issue of "*genuine and subsisting*". In this context, my attention has been directed to the decision of **SR (subsisting parental relationship, s117B(6)) Pakistan [2018] UKUT 334 (IAC)**, in particular at paragraphs 35 and 37. For a parental relationship to be genuine and subsisting something more is required than mere consanguinity. Evidence would be required to demonstrate that the person was taking an active role in the child's upbringing.

20. The Judge makes further reference to the factual circumstances at paragraph 37 in these terms:

> "*As already stated I have very little information about the child and it would be wrong to attempt to predict the outcome of the contact proceedings. I note from the Appellant's evidence that both sets of grandparents live in the UK*".

The Judge then cites various case law in relation to best interests of children, before stating the following at paragraph 44 by way of conclusion:

> "*Taking all these factors into consideration, including my findings in relation to the test result and that the Appellant has not met the suitability requirement, nevertheless I find that the decision under appeal is not proportionate when weighing the public interest against the Appellant's Article 8 right to respect for his family life. It will be for the Family Court to determine whether the Appellant should have contact with his child and I would expect the Respondent to grant a sufficient period of leave to enable those proceedings to be concluded*".

21. Over and above the error of the Judge in failing to evaluate the question of subsisting parental relationship, it seems to me that the Judge also proceeded without due regard to the lead case offering guidance in cases

involving family proceedings, **RS (immigration and family court proceedings) India [2012] UKUT 00218 (IAC)**. The Upper Tribunal - consisting of Lord Justice McFarlane, the then President Mr Justice Blake and Upper Tribunal Judge Martin - gave extensive and definitive guidance on the approach that should be adopted in cases involving appeals where a claimant seeks to rely upon outstanding family proceedings relating to his or her child. I do not propose to reproduce that guidance here, it is a matter of record.

22. Ms Smith candidly acknowledged that the Judge plainly failed to have regard to this guidance: in such circumstances she did not seek to defend the decision of the First-tier Tribunal Judge. Indeed, it was common ground before me that the Judge's approach to the issue of contact was flawed. Over and above any issue in respect of the failure to consider **RS**, the Secretary of State's also pleaded error in the Judge accepting that there were current contact proceedings in the absence of any supporting evidence – to which a degree of weight is inevitably leant by the Judge's finding that the Appellant had previously used deception. Irrespective of the merits of this latter point, t is common ground that the Judge's decision in respect of Article 8 requires to be set aside.

23. Ms Smith has brought to my attention further evidence now available to demonstrate not only that contact proceedings were in process but that matters have moved on. She has done so by way of producing a letter from the legal representatives acting for the Appellant in his family proceedings. Curiously, those legal representatives are the same legal representatives who supported the Appellant in his appeal before the First-tier Tribunal. Such a circumstance makes it the more remarkable that there was nothing more by way of evidence and substance in respect of the contact proceedings before the First-tier Tribunal. Be that as it may, the letter that has now been produced in material part is in the following terms:

> *"I am able to confirm that the application was lodged with the court in March 2017. This was after you had attended mediation with another law firm. I recall that your ex-partner did not attend this mediation. This took place in Nottingham. Your application was lodged in Wolverhampton. The court listed a hearing in May 2017. This would have been a directions hearing. I can confirm that the main hearing took place over two days 12 and 13 July 2018. The judgment was reserved. A judgment hearing took place 5 October 2018. From the above it is clear that your contact matter was ongoing at the date of the immigration matter. I am able to confirm that you have asked me to locate the courses as suggested by the Judge. As discussed I am speaking to various providers. We have found one that starts in January"*.

24. Ms Smith was appropriately cautious as to the amount of information she was able to put before the Tribunal today. In this context she said that the Appellant's current immigration representatives have written to the Family Court to seek permission to disclose the detail and evidence in relation to the Family Court proceedings which necessarily are, as things stand, a matter of confidentiality. Ms Smith was able to inform me that the Appellant had not been granted direct access by the Family Court but had been granted indirect access. The reference to 'courses' was in respect of taking measures to enable him to put himself in a position to increase the frequency and the nature of the contact that he is presently permitted with his son - it is said with a view in due course to seeking to establish direct contact rather than just indirect contact. The present representatives have only recently been instructed and accordingly it was only on 7 November 2018 that they wrote to the Family Court asking for permission to disclose these matters to the Tribunal and to the Secretary of State.

25. Necessarily this new information – albeit in some respects incomplete - puts the situation in a slightly different light. It seems to me that the Article 8 evaluation needs to be re-visited taking into account the findings of the Family Court; it will be necessary in due course for a Tribunal to evaluate those matters against the framework of the guidance in **RS (India)** on the basis of the facts as they pertain at the date of that assessment. Those facts necessarily may move on with time from the current situation, bearing in mind that I am told that it is hoped that the Appellant will be able to increase his prospects of having direct contact with son. Of course, if that is not a matter that is likely to happen, then there is perhaps no reason why indirect contact cannot continue after the Appellant's departure/removal from the United Kingdom. Whether that indeed be the situation will, as I say, require careful analysis on the basis of all available evidence in due course.

26. On these bases it is common ground that the appeal should be remitted to the First-tier Tribunal to be considered by any Judge other than First-tier Tribunal Judge Law.

27. In this regard, after discussion with the parties I indicated at the conclusion of the hearing that the future conduct of the appeal should be in accordance with the following Directions:

    (i) I am given to understand that the earliest available listings in the Nottingham Tribunal are not until February 2019. In the circumstances for the avoidance of any doubt and to enable the parties due time to prepare for the next hearing, I direct that the appeal not be relisted before 13 February 2018.

(ii) The Appellant and his representatives are to continue to pursue steps to obtain permission from the Family Court to disclose the details of the Family Court proceedings including specifically the judgment handed down on 5 October 2018 and any concomitant order of the Tribunal. The Appellant's representatives are to file and serve such documentation upon receipt.

(iii) If for any reason disclosure is not granted, then I direct that the Appellant's representatives are to provide the First-tier Tribunal with the relevant information as to the court proceedings in order for the First-tier Tribunal to consider whether it should utilise the Joint Protocol that exists between the Immigration Tribunal and the Family Court to seek to obtain such information for itself.

(iv) Otherwise, any further evidence is to be filed and served by the parties at least fourteen days prior to the next hearing.

(v) If there are any particular difficulties in the timetable set out above, the parties are at liberty to apply to the Tribunal for variation.

28. I am told that the Appellant does not require an interpreter.

29. Because these proceedings involve a child who has been the subject of family proceedings, I direct that an anonymity order be made to cover the current decision and the future proceedings until such time as any other Judge varies that order.

Notice of Decision

30. The decision of the First-tier Tribunal contained a material error of law and is set aside.

31. The decision in the appeal is to be remade before the First-tier Tribunal by any Judge other than First-tier Tribunal Judge Law.

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.

Signed: Date: **3 January 2019**

Deputy Upper Tribunal Judge I A Lewis