Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: PA/03647/2018**

THE IMMIGRATION ACTS

Heard at Bradford	**Decision & Reasons Promulgated**
On 15 March 2019	**On 8 April 2019**

Before

UPPER TRIBUNAL JUDGE HEMINGWAY

Between

T

(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: In Person
For the Respondent: Mr McVeety (Senior Home Office Presenting Officer)

DECISION AND REASONS

1. This is the claimant's appeal to the Upper Tribunal, brought with the permission of a judge of the First-tier Tribunal, from a decision of the First-tier Tribunal (the tribunal) in which it dismissed the claimant's appeal to it from a decision of the Secretary of State, which he had made on 22 February 2018, to refuse to grant leave to remain on the basis of his asserted family and private life. The tribunal's decision was made on 15 November 2018 following a hearing of 14 November 2018 which the claimant attended and at which he gave oral evidence. Both parties were represented before the tribunal.

2. I have decided to make an anonymity direction in this case because it involves young children whose privacy, it seems to me, should be protected.

3. By way of background, the claimant, who was born on 1 January 1992, is a national of Afghanistan. He entered the UK illegally on 28 October 2011 and claimed asylum which was refused on 20 January 2012. He appealed but his appeal was dismissed by the First-tier Tribunal and then, after a grant of permission to appeal, by the Upper Tribunal. The Upper Tribunal's decision to dismiss his appeal was made on 11 November 2012. Essentially, the First-tier Tribunal found him not to be credible and the Upper Tribunal concluded it had been open to it to do so. The claimant did not leave the UK despite his appeal having failed and, on 3 October 2014, he applied for limited leave to remain on the basis of family and private life in the UK. Leave was granted until 29 June 2017. The claimant has a child whom I shall call M, who was born in the UK and who is British, and he has had a relationship with the child's mother, also a British Citizen, whom I shall call R. The child was born on 6 December 2013 and it must have been primarily because of the child and the relationship with his mother that limited leave was granted. There is evidence to suggest, though, that that relationship ran into difficulties. In any event, it appears that that leave expired but that subsequently, on October 2017, the claimant made a further application to the Secretary of State for further leave to remain, predominantly, on the basis of his being (which is accepted) the father of M. It was that application which led to the Secretary of State deciding to refuse the application and to the appeal to the tribunal.

4. The tribunal noted the evidence given to it that, in fact, the claimant and R had entered into an Islamic marriage on 7 August 2014. It was further noted that R has two children from a previous relationship who had been born on 25 August 2011 and 4 September 2012 respectively. On the claimant's case there had come a time when the relationship with R had broken down and, indeed, there was evidence before the tribunal that a restraining order had been made in respect of the claimant and that he had subsequently been arrested on 10 October 2017 when he had sought to make contact with R. But it was also contended on behalf of the claimant that the parties wished to reconcile and that, in any event, the claimant was having regular contact with his child. The claimant produced some letters from R and from some of her friends suggesting that he is a good father. The respondent's position at the appeal, though, was that the evidence did not demonstrate that the claimant played an active role in the child's upbringing. The contact he had with the child was not, it was argued, meaningful or regular and was not sufficient to demonstrate that he has a genuine or subsisting parental relationship with that child.

5. The tribunal resolved the issues before it in this way:

"**Determination of issues**

20. In the absence of the children, this appeal would have been utterly hopeless as, given the fact that the Appellant spent his formative years in Afghanistan, speaks the language, was educated there, has the ability to work there, is in good health, and would not need family support, he could easily re-integrate into life there. I bear in mind in that regard the lack of any evidence to suggest that the findings from his 2012 hearing are in any way unsafe. There is no cogent evidence that he would be easily identified due to having westernised manners and customs. I do not have to accept what he says just because he says it, and bear in mind the conflicting evidence he gave surrounding his date of birth and age. He was not clarifying his position when I pointed out the discrepant evidence but trying to explain away the gaping lacuna.

21. I do not accept he meets the suitability requirements of the Immigration Rules. The restraining order was imposed due to his unacceptable behaviour. He broke the order. It is a pattern of behaviour. He still has to use an intermediary to facilitate contact such is the risk he poses to [R]. If it was felt that the restraining order was in force and no longer required, he could have applied to discharge it.

22. The private life he had, was developed while leave had always been precarious, and was unlawful from 6 December 2012 to 29 December 2014 and after 29 June 2017.

23. I accept he is the father of a British child and sees him on a regular basis as I have no reason to doubt his evidence on this or on the letters (on this point) and pictures. That contact is 2 or 3 times a week for up to 1 hour. He plainly does not have sole responsibility for [S] or live with him.

24. I place little weight on the letters from [R and her friends] regarding the strength of the relationship between the Appellant and the children as none of them attended to have their evidence tested.

25. I do not accept that there is any intention for the nature of his relationship to [R] to change, as she did not attend to have this tested in evidence, and he could not cogently explain why if he thought the restraining order had ended they had not taken the opportunity to rekindle their relationship. Nor does it sit easily with the evidence that she is still sometimes awkward over contact.

26. I do not accept that the contact he has indicates he plays an active role in [S's] upbringing. It amounts to a very small amount of play time 2 or 3 times a week. He has failed to establish what role he plays in the life of [S's] siblings other than providing a bit of play time. His contact with [S] is irregular and only lasts about 1 hour when it happens. It is less with the siblings as they do not attend them at all. He has therefore failed to establish he has a genuine or subsisting parental relationship with him. He has also failed to establish that [R] would not be able to cope with any short-term distress or confusion [S] may have at not seeing the Appellant.

27. He has therefore failed to establish he has a family life of meaning or value with anyone, or that the Respondent's decision would interfere with that. He has produced no cogent evidence as to what private life he has here, that being of limited utility in any event.

28. Removal would interfere with his limited private and family life. Consequences of gravity may flow from the decision give the low threshold to establish that. It is lawful to remove him as he does not meet the Immigration Rules. It would be pursuing the lefitimate aim of retaining the integrity of immigration control and preserving the economic well-being of the country. In relation to proportionality, the best interest of the children is a primary consideration and is met by them staying here with Rebekah. She is well able to meet all their needs as she does now. His ability to speak English is a neutral factor. There is no evidence he works or would not be an economic burden on the state. His very limited family and private life is such that when balanced against the need to retain the integrity of immigration control and the economic well-being of the country, the balancing exercise falls on the side of the Respondent. His contact will change as I do not accept that for young children

> modern means of communication make up for short periods of play, but given his limited role in their lives, a break until they are old enough to use modern means of communication would not unduly affect them.
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> 29. For all these reasons I am satisfied it is reasonable and proportionate to require the Appellant to leave the United Kingdom".

6. The claimant, through his then representatives, sought permission to appeal to the Upper Tribunal. Part of what was said in those grounds seems to me to be appropriately characterised as attempted re-argument with the tribunal's findings and conclusions. But there is a contention that the tribunal failed to have regard to the content of section 117B(6) of the Nationality, Immigration and Asylum Act 2002 (its being suggested the tribunal had "failed to even mention" that provision) and it is possible to read the rest of the grounds as amounting to a suggestion that the tribunal reached findings and an ultimate conclusion which was against the weight of the evidence. Permission to appeal was granted and the granting judge relevantly said this:

> "3. The judge arguably made no clear finding upon what is in the best interests of the appellant's son. He appears to make contradictory findings in terms of whether the appellant does, or does not, have regular contact with his child (see [23] and [26] of the decision). The judge appears to conflate the question of the appellant having an "active role" in his son's life with the question of whether he has a "genuine and subsisting parental relationship" with that child, the two issues being different (see R (on the application of RK) v Secretary of State for the Home Department (s). 117B (6); "parental relationship") IJR [2016] UKUT 00031 (IAC) and SR (subsisting parental relationship – s 117B (6)) Pakistan [2018] UKUT 334 (IAC)). It is correct that the judge does not specifically refer to s 117B of the 2002 Act, although he appears to have had it in mind as part of his reasoning. The grounds disclose arguable errors of law and permission is granted on the grounds as pleaded".

7. Permission having been granted for the reasons set out in the grounds and what appear to be additional reasons set out in the grant, the matter was listed for an oral hearing before the Upper Tribunal (before me) so that it could be decided whether the tribunal had erred in law and, if it had, what should flow from that. The claimant, despite having been represented before the tribunal and at the time when permission to appeal to the Upper Tribunal was sought, attended before me unrepresented. Indeed, there was on file a letter from his now former representatives of 13 March 2019, indicating that they were "no longer acting as his legal representatives". The claimant told me that problems had stemmed from his inability to pay for further legal assistance and representation. He did not ask me to adjourn the proceedings and, in any event, it appeared to me that if there was such a funding difficulty now it was unlikely that such would be resolved during the period of any short adjournment which might be granted. Further, I already had the benefit of the written grounds which had been provided by his former representatives along with the actual grant of permission.

8. In the circumstances, I heard from Mr McVeety first of all. He argued that the grounds of appeal lacked any merit. He said he could understand why permission had been granted for the reasons it had but thought that the tribunal had "just about done enough" to justify its decision. The claimant said that the tribunal had been wrong in thinking he did not have enough contact with his child. R, he told me, is supportive of his appeal and had attended today's hearing with him. He does his best for his child. His partner would have come to the hearing before the tribunal but it had not been suggested to him that she should attend.

9. I have concluded that the tribunal did not err in law in making its decision. It follows that that decision shall stand. I set out my reasoning below.

10. As I have already indicated, I take the view that much of what is said in the written grounds amounts to attempted re-argument with the tribunal's findings. The grounds contain a number of factual assertions such as one to the effect that he is "actively involved in his son's life" and one to the effect that "it is only due to the current issues he is experiencing with his son's mother" that contact with the child is not greater. That sort of material cannot, of itself, demonstrate arguable error. As to the suggestion that the tribunal failed to have regard to section 117B(6) of the Nationality, Immigration and Asylum Act 2002, it is not an error of law to specifically refer to a statutory provision so long as the correct legal approach has been taken and the correct legal tests have been applied. But in any event, there is a brief reference to that and other statutory provisions at paragraph 3 of the written reasons. But much more importantly, what the tribunal has to say in the portion of its written reasons which I have set out above, demonstrates that it had section 117B (6) in mind. It did consider and decide the question of whether or not the claimant has a genuine and subsisting parental relationship with a qualifying child which is the issue raised in section 117B(6) (a). It expressly found at paragraph 26 of its written reasons that the claimant had "failed to establish he has a genuine or subsisting parental relationship" with the child whom he had fathered. It was not part of the claimant's case before the tribunal that even if he did not have such a relationship with his own child he did with R's other children whom he had not fathered. Given the conclusion it had reached relating to section 117B(6)(a) it was not necessary for the tribunal to go on to consider the second limb of that section which relates to the reasonableness or otherwise of expecting a qualifying child to leave the UK. I conclude, therefore, that the tribunal did not overlook that legislative provision and that, in fact, it consciously asked itself the key question in the context of this appeal raised by it and resolved that question.

11. Turning then to what was said by the granting judge, it is right to say that the tribunal did not, in terms, say what it thought would be in the best interests of the claimant's child with respect to the claimant's future geographic location. But it had found he had failed to show a genuine or subsisting parental relationship. It surely followed from that, that it was effectively deciding that either it would not be in the child's best interests for the claimant to remain in the UK or, that it was but only marginally so. Either way, the claimant would not derive any significant support for his case from that. On the face of it the tribunal does appear to have reached an inconsistent finding in that at paragraph 23 of its written reasons it accepted that the claimant sees the child "on a regular basis", whereas at paragraph 26 of its written reasons it described the contact he has with his child as being "irregular". But it does not seem to me that it is helpful to focus overly on that relatively minor matter. The tribunal's written reasons do have to be read as a whole and when that is done, it is apparent that it was reaching an overall finding that the contact the claimant had with his son was not meaningful or of any real substance. Whilst differently constituted tribunals might have reached a different view on the same evidence, it was open to this tribunal to take that view on the material before it. It does not seem to me that the tribunal did conflate the question of the claimant having "an active role" in his child's life with the question of whether there was a "genuine and subsisting parental relationship". On a true reading of what it had to say it seems to me that the tribunal was simply finding that neither was the case. Additionally, and in any event, while I am sure it is possible to conclude that a person who does not play an active role in that child's life can nevertheless have a genuine and subsisting relationship with that child, the former is not necessarily irrelevant to a consideration of the latter. The tribunal found what it did regarding the parental aspect and was entitled to so find.

12. The claimant seemed to suggest, before me, that any difficulties there had been with R had been resolved. It is not for me to decide, in a decision concerned with error of law, whether that is true or not. But if the claimant and any representative he may find in the future think that there has

been a meaningful change in circumstances such as to justify a fresh application for leave on human rights grounds then, I suppose, such an application can be made. I am not, however, suggesting that one should be made as that is simply not a matter for me.

13. The appeal to the Upper Tribunal fails for the above reasons

Decision

The decision of the First-tier Tribunal did not involve the making of an error of law. Accordingly, the claimant's appeal to the Upper Tribunal is dismissed.

Anonymity

I grant the claimant anonymity pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008. Accordingly, no report of these proceedings shall identify the claimant or any member of his family. The grant applies to all parties to the proceedings. Any breach may lead to contempt of court proceedings.

Signed: Dated: 3 April 2019

Upper Tribunal Judge Hemingway