



**Upper Tribunal  
(Immigration and Asylum Chamber)**

Appeal Number: PA/08396/2019

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 20 March 2020**

**Decision & Reasons Promulgated  
On 22 April 2020**

**Before**

**UPPER TRIBUNAL JUDGE BLUNDELL**

**Between**

**S K**

Appellant

**and**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Mr K Smyth, of Keasar & Co Solicitors

For the Respondent: Ms S Cunha, Senior Presenting Officer

**DECISION AND REASONS**

1. The appellant is an Afghan national who was born on 1 September 1993. He appeals, with permission granted by a judge of the First-tier Tribunal, against a decision which was issued by FtT Judge Callow on 30 December 2019.

**Background**

2. The appellant arrived in the UK in 2009 and claimed asylum. His claim was refused and a subsequent appeal was dismissed by Immigration Judge Prior in May 2011. The appellant secured permission to appeal against Judge Prior's decision but only in respect of Article 8. His Article 8 ECHR claim was at that time based on his relationship with a child called H. The Upper Tribunal (Judge Freeman)

held that the interference proposed with that relationship was proportionate and dismissed the appeal.

3. The appellant remained in the UK and, on 2 March 2014, his son K was born. The appellant duly made further submissions to the Secretary of State, contending that he had a fresh protection and human rights claim. The former was based essentially on the humanitarian situation in Afghanistan, the latter on his relationship with K. K, it should be noted, does not live with the appellant or with K's mother. He is, and has at all material times, been the subject of a Special Guardianship Order, by which he is to be cared for by Michelle and Colin Smith, who are the parents-in-law of K's aunt. The appellant was until recently permitted to have supervised contact with K four times per year.
4. Although the respondent accepted that the appellant's claim was a fresh claim as defined by paragraph 353 of the Immigration Rules, she did not accept that his removal would cause the United Kingdom to be in breach of its international obligations and she refused the protection and human rights claims on their merits. The appellant appealed.

#### **The Appeal to the First-tier Tribunal**

5. Before the First-tier Tribunal, the appellant maintained that he was entitled to Humanitarian Protection under Article 15(c) of the Qualification Directive and/or that that he was entitled to leave to remain under paragraph 276ADE(1)(vi) of the Immigration Rules. The judge dismissed both of those claims and permission to appeal was not sought in respect of those conclusions.
6. The appellant also contended before the FtT that his removal would be contrary to Article 8 ECHR on account of his relationship with K. It was submitted that he had a family life with his son and that it would be disproportionate to interfere with the same, particularly with reference to s117B(6) of the Nationality, Immigration and Asylum Act 2002. Notwithstanding the way in which the claim was put by Mr Smyth, the judge confined his analysis to the appellant's private life. There was no examination of the question of whether the appellant enjoyed a family life with his son, and no examination of the way in which S117B(6) applied, if at all.

#### **The Appeal to the Upper Tribunal**

7. It was in light of the omissions I have described immediately above that permission to appeal was sought and granted. At the outset of the hearing, I asked Ms Cunha whether she was able to submit that the judge of the FtT had not erred materially in law. Wisely, she declined to make that submission, and accepted that the failure to consider the questions above amounted to an error of law which required the judge's Article 8 ECHR assessment to be set aside to that extent. That must be right; the appellant's case was squarely advanced as one of family life between father and son and it was submitted that s117B(6)

was of assistance to him. The failure to resolve those submissions necessarily amounted, in my judgment, to an error of law.

8. Having indicated at the hearing that I would set aside the FtT's decision to the extent set out above, I asked the advocates to address me on the appropriate relief. Both submitted that I should remake the decision on the appeal myself, and they agreed that there was no need for a further hearing. Mr Smyth indicated that he did not consider there to be any need for oral evidence from the appellant. Ms Cunha agreed, accepting that the description of the relationship between the appellant and his son K was not in dispute. It was therefore agreed between the advocates that the resolution of the appeal depended upon an assessment of that relationship in Article 8 ECHR terms. I invited the advocates to consider the decision of the Court of Appeal in AB (Jamaica) & AO (Nigeria) [2019] EWCA Civ 661; [2019] 1 WLR 4541. Mr Smyth was aware of that decision, Ms Cunha was not. I rose to enable her to consider it and to allow the advocates to prepare their submissions on the remaking of the appeal.
9. Upon the hearing resuming, Ms Cunha confirmed that she was ready to proceed. She relied on the refusal letter, which considered the application of s117B(6) to the appellant's case. It also focused upon ZH (Tanzania) [2011] UKSC 4; [2011] 2 AC 166. It was not submitted by the respondent that it would be reasonable for K to relocate to Afghanistan, given his nationality and his particular circumstances and Ms Cunha recognised, in the circumstances, that the respondent was in what she described as a 'precarious' position. She nevertheless submitted that the appellant did not have parental responsibility for his son and that the limited contact he enjoyed did not amount to a genuine and subsisting parental relationship. The appellant did not enjoy sole responsibility for the child, as in TD (Yemen) [2006] UKIAT 49, as all of the relevant decisions were taken by the special guardians.
10. Mr Smyth submitted that my focus should be on s117B(6). There could be no doubt that the appellant enjoyed a genuine and subsisting relationship with his son. The real question for the Tribunal was whether the relationship could properly be described as a parental one. All depended on the facts in that regard, he submitted. The appellant's son did not know the appellant in any other capacity and was plainly aware of him as his father. K's mother had been unable to care for him for a variety of reasons and responsibility for him had therefore passed to the special guardians. It was relevant to recall that the appellant had been demonstrably committed to his son from the outset and it was clearly the case – as shown by the special guardian's most recent statement – that it was hoped and expected on all sides that the appellant would continue to play an important part in his son's life. In the circumstances, there was a relationship between the appellant and his son which satisfied the test in s117B(6)(a) and the appeal fell to be allowed on Article 8 ECHR grounds as such. In the event that I was not to allow the appeal on that basis, Mr Smyth invited me to consider the appellant's relationship with his son as part of a holistic analysis of Article 8 ECHR.

11. I reserved my decision.

### **Analysis**

12. There is no disagreement between the appellant and the Secretary of State about the relevant facts. It is accepted that the appellant is the biological father of a six year old British citizen, K. It is accepted that K has not been raised by his mother, and that the Family Court granted a Special Guardianship Order to his relatives so that his best interests would be safeguarded.
13. I have statements before me from Mrs S, who is K's female Special Guardian. She explains the background to the order being made, and to the appellant gaining contact with his son. She and her husband received a call from K's mother some years ago. She was in a state of distress and was unable to care for herself and her first child, L. Mrs S and her husband agreed that she and her child should come to live with them. Unfortunately, following an argument which prompted police intervention, L's mother left and did not return. L is now 9 years old and remains with Mrs S and her husband.
14. In 2014, Mrs S received a call from Birmingham Social Services, stating that they had a boy in their care who was L's half brother. This child was K. Mrs S and her husband agreed to care for K so that he could be with his brother. They subsequently agreed to take their half-sister, R. They continue to have parental responsibility for all three children.
15. Mrs S and her husband first encountered the appellant at a Family Court hearing in 2014. An officer from CAFCASS had made contact with the appellant and he had attended the hearing. He had not been in a relationship with K's mother and she had lied to him about K's paternity but a DNA test subsequently showed that the appellant was the father. Mrs S describes the appellant's subsequent contact with his son as being 'very enthusiastic'. She notes in her first statement (made in 2017) that K talked about his father and pretended to speak to him on a toy telephone. She had agreed that the appellant would see his son four times a year and she was keen to ensure that this continued so that K would have one of his parents in his life.
16. This account is supported by an email from Birmingham Children's Trust dated 5 April 2018. It is confirmed in that email that the appellant was not considered to be a viable carer for K because (and seemingly only because) he had no lawful status in the UK. A further statement from Mrs S, dated 13 March 2020, describes how the appellant is a 'big part' of K's life and how they have increased his visits from four times a year to every other month. Contact remains supervised but Mrs S hopes that it will become unsupervised when K is a little bit older. She also hopes that K can continue to thrive, knowing his father and having him as part of his life.

17. It is not suggested by Mr Smyth that the appellant's relationship with his son can generate a claim under the Immigration Rules. He has no relationship with K's mother or with any other qualifying partner. He obviously cannot submit that he either has sole responsibility for his son, or that he is taking and intending to continue to take an active role in his son's upbringing, so as to satisfy E-LTRPT 2.4 of Appendix FM of the Immigration Rules. As Ms Cunha noted in her submissions, the responsibility for raising K has been taken by Mrs S and her husband for some years. It is therefore to Article 8 ECHR outside the Immigration Rules that the appellant must turn.
18. It is common ground, as I understand it, that Article 8 ECHR is engaged by the relationship between the appellant and his son. In light of the consistent line of authority of the ECtHR which includes Ciliz v The Netherlands [2000] ECHR 365; [2000] 2 FLR 469, I conclude that it is engaged in its family life aspect. The default position, on the authorities, is that a family life for the purposes of Article 8 ECHR exists between a parent and their biological child. It is obviously correct that the appellant was not initially in contact with his child (having been told untruthfully that he was not the father) but he has been in increasing contact with K since he was located by CAFCASS in 2014.
19. It was not suggested by Ms Cunha that the interference proposed with the relationship between the appellant and his son would not have consequences of sufficient gravity so as to engage the protection of Article 8 ECHR, at the second stage of the enquiry required by Razgar [2004] 2 AC 368. On the accepted facts of this case, and recalling the rather modest threshold to be crossed (AG (Eritrea) [2007] EWCA Civ 801; [2008] All ER 28 refers, she was correct not to make that submission. The focus of my enquiry must therefore be on the proportionality of the appellant's removal.
20. It is section 117B(6) of the 2002 Act which forms the mainstay of Mr Smyth's proportionality argument on behalf of the appellant. That provision is one of the public interest considerations inserted into the 2002 Act by the Immigration Act 2014. Where it is answered in favour of an appellant, it is determinative of the proportionality assessment, such that it has been described variously as 'self-contained' and 'definitive' in the authorities. S117B(6) in the following terms:
  - (6) In the case of a person who is not liable to deportation, the public interest does not require the person's removal where—
    - (a) the person has a genuine and subsisting parental relationship with a qualifying child, and
    - (b) it would not be reasonable to expect the child to leave the United Kingdom.

21. It is accepted by Ms Cunha that the question posed by sub-section (b) must be resolved in the appellant's favour. It could not conceivably be reasonable to expect K to leave the country of his nationality for Afghanistan, not least because that would mean leaving the security of his relationship with his special guardians and the relationships with his half-siblings L and R. The children are noted by social services to have flourished in this family environment and it would plainly not be reasonable to separate them at this stage.
22. I consider Mr Smyth to be correct in his submission that the appellant has a genuine relationship with his son. It is established by DNA evidence (which was seen by the Family Court) that he is K's biological father. It is established on the basis of the evidence to which I have referred above that the appellant was tracked down by CAF/CASS during the Family Court proceedings and that he has, since that point, featured in his son's life. There is no suggestion by the respondent that this has simply been a ruse designed to secure an immigration advantage. Any such submission would have been surprising, given the evidence before me from Mrs S and Birmingham Social Services. There can also be no doubt, as Mr Smyth submitted, that the appellant has a subsisting relationship with his son. The relationship between the appellant and his son continues and has, as shown by Mrs S's most recent statement, continued to deepen and develop as a result of their ongoing contact.
23. I agree with Mr Smyth that the real issue is whether there is a genuine and subsisting *parental* relationship between the appellant and his son. It was for this reason that I required the advocates to furnish me with submissions about the application of AB (Jamaica) & AO (Nigeria) to the facts of this case.
24. I need say only a little about the facts of the two cases before the Court of Appeal. It suffices for present purposes to note as follows. AB's relationship with his child's mother had broken down but he continued to see the child three times a week: [2]. AO's relationship with his child's mother had broken down as a result of AO's domestic violence and he was only permitted by the Family Court to have indirect contact with the child: [3]. Much of the judgment given by Singh LJ (with which King and Underhill LJ agreed) concerned the submission which had been rejected by the Upper Tribunal in JG (Jamaica) [2019] UKUT 72 (IAC), which was whether s117B(6) of the 2002 Act applies at all when there is no realistic prospect of the qualifying child leaving the UK: [48] refers. Albeit for slightly different reasons than those given in JG (Jamaica), the Court of Appeal also rejected the submission made by the Secretary of State in that regard: [60]-[75] refers, in particular.
25. What was said by Singh LJ and King LJ about the respondent's fourth ground of appeal in AO's case is highly relevant for present purposes, however. By this ground, it was submitted before the Court of Appeal that AO's relationship with his child could not rationally have been held (by the FtT and the Upper Tribunal) to amount to a genuine and

subsisting parental relationship which engaged s117B(6). Singh LJ considered two decisions of the Upper Tribunal - SR (Pakistan) [2018] UKUT 334 (IAC) and R (RK) v SSHD [2016] Imm AR 527 - and one of the Court of Appeal: VC (Sri Lanka) [2018] Imm AR 517.

26. Singh LJ rejected the Secretary of State's submission, based on the first and last of those decisions, that some element of direct personal care was required to be shown in order to engage s117B(6). He noted that what was said by MacFarlane LJ in VC (Sri Lanka) was said in a different statutory context and concluded that UTJ Plimmer had erred in SR (Pakistan) when she carried those dicta across to s117B(6): [92]-[96]. Singh LJ did endorse what had been said by UTJ Grubb in RK, however, and held that the test posited by s117B(6)(a) is expressed in words of the ordinary English language which require no further gloss: [98]. He considered that the exercise was a highly fact-specific one of mixed fact and law: [98] and [101]. At the conclusion of his judgment, he stated expressly that he wished to associate himself with what was said by King LJ: [103].
27. King LJ agreed that the exercise was highly fact-specific: [106]. She recalled what had been said by the President of the Family Division in re Q [2016] 2 FLR 287: [107]. She noted that the sub-section reflected the importance to a child of contact with a parent with whom he is not living: [108]. And she noted that it was common ground that it was not necessary for the absent parent to have parental responsibility. She emphasised the importance of considering the type of contact permitted with a child and the reasons for any limitation on contact: [109]-[111]. Underhill LJ agreed with Singh LJ, and added a few words of his own about the decision in JG (Jamaica).
28. With those dicta firmly in mind, I return to the facts of the appellant's case. I consider that there are matters which militate for and against a conclusion that the appellant has a genuine and subsisting parental relationship with K. He does not live with his son and their direct contact has only been four times per year. He plays no role in the day-to-day care of his son and he makes no decisions for K. These roles are played entirely by Mrs S and her husband. Noting what was said by Judge Grubb in RK, as endorsed by Singh LJ in AB & AO, these matters must all militate against a conclusion that s117B(6)(a) is engaged.
29. On the other hand, K knows that the appellant is his father and the direct contact between them is mutually enjoyed, and encouraged by Mrs S and her husband. There is nothing to suggest that the limitation to supervised contact reflects any concern about the appellant, whether on the part of the Special Guardians, the Family Court or Social Services. I consider Mr Smyth to have been correct when he submitted that the context in which the appellant and K enjoy their relationship must be borne in mind. He is a little boy who does not know, and has not known, his biological mother. It is therefore the appellant who represents his only parent, properly so called. He is at an age where he will understand that, and at which the bond with his

father is likely to be important to him, notwithstanding the care provided by Mrs S and her husband.

30. It is clear – and nobody has suggested otherwise – that Mrs S and her husband have not only showed incredible charity in raising these three children; they have also enabled the children to flourish. I do not intend in any way to downplay the importance of their role in the lives of K and his half siblings but the fact remains, as emphasised by King LJ, that contact between parent and child is a fundamental element of family life. As recognised by Mrs S and her husband, that contact is likely to become more important to K as he grows older, and they fully intend to permit a further increase in contact, noting (as they have) that it is well-received by K.
31. On the unusual facts of this case, I come to the clear conclusion that the appellant’s relationship with his son is one which can properly be categorised as a genuine and subsisting parental relationship. In light of K’s unusual and distressing history, the absence of more regular contact and a decision-making role are not determinative factors. The matters to which I have referred in the preceding two paragraphs militate firmly in favour of a conclusion that the test in s117B(6)(a) is satisfied and that is the conclusion which I reach.
32. Since the appellant is not liable to deportation, and as it is not suggested by Ms Cunha that K could reasonably be expected to leave the UK, my conclusion regarding the relationship is determinative of the proportionality exercise. The appeal will accordingly be allowed on Article 8 ECHR grounds.

**Notice of Decision**

The FtT’s analysis of Article 8 ECHR was vitiated by legal error and that part of the decision is set aside. I remake the decision on that ground of appeal, and allow the appellant’s appeal on Article 8 ECHR grounds.

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

Unless and until a Tribunal or court directs otherwise, the appellant’s children and their half-siblings are granted anonymity. No report of these proceedings shall directly or indirectly identify those children. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.



MARK BLUNDELL  
Judge of the Upper Tribunal (IAC)

21 April 2020



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**NOTIFICATION OF APPEAL RIGHTS**

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be **received** by the Upper Tribunal within the **appropriate period** after this decision was **sent** to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent:
2. Where the person who appealed to the First-tier Tribunal is **in the United Kingdom** at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is **12 working days (10 working days, if the notice of decision is sent electronically)**.
3. Where the person making the application is in detention under the Immigration Acts, **the appropriate period is 7 working days (5 working days, if the notice of decision is sent electronically)**.
4. Where the person who appealed to the First-tier Tribunal is **outside the United Kingdom** at the time that the application for permission to appeal is made, the appropriate period is **38 days (10 working days, if the notice of decision is sent electronically)**.
5. A **“working day”** means any day except a Saturday or a Sunday, Christmas Day, Good Friday or a bank holiday.
6. The date when the decision is **“sent”** is that appearing on the covering letter or covering email