



Upper Tribunal

(Immigration and Asylum Chamber)

Appeal Number: UI-2023-002283

HU/01636/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:

On the 21 September 2023

Before

DEPUTY UPPER TRIBUNAL JUDGE DAVEY

Between

MF

(ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Appearances:

For the Appellant: Mr Alam, Counsel

For the Respondent: Ms A Everett, Senior Home Office Presenting Officer

Prepared 7 September 2023

Heard at Field House on 7 September 2023

DECISION AND REASONS

1. The Appellant sought leave as the parent of a British child to remain in the United Kingdom. The Appellant is a national of Pakistan. The Appellant sought to remain in order to establish his relationship with his child, M K, date of birth 12 June 2011. The child's mother is a British national, as is the child. The relationship between the Appellant and the child's mother broke down and ended in Islamic divorce in October 2011. The child's

mother was reluctant for the Appellant to see the child. A dispute broke out which resulted in a Family Court order, on 10 May 2021 that the Appellant could have limited, but not direct, access to the child and that order has persisted, with the Appellant being limited to indirect access but has regularly sent cards and gifts to the child and the Appellant believed that the child is not responding because the child's mother is preventing the same. The Appellant appealed against the Respondent's decision, dated 21 February 2022, to refuse leave to remain. His appeal was dismissed by First-tier Tribunal judge Young-Harry on 17 April 2023. Permission to appeal was granted by First-tier Tribunal Judge Adio on 30 May 2023.

2. The current position was that the Appellant was subject to a Family Court access order for 18 months and the dispute is listed for dispute resolution on 27 September 2023 but the progress of an application for greater access has, as yet, made no progress. The Appellant relies upon his financial support for the child, the sending of money to the mother of the child who has confirmed receipt of the same. The first stage in trying to obtain greater contact with the child was and is to proceed through the mediation process, before the matter progresses to court. There is no time estimate of when the outcome of mediation or Family Court proceedings will be made. The Appellant seeks to remain in the UK. The judge who granted permission to appeal concluded it was arguable that the judge had not properly assessed the role the Appellant had played in the child's upbringing. Ultimately permission to appeal was given to address whether the judge had made an error of law on the issue of whether the Appellant had established a genuine and subsisting parental relationship, which the case law reflected upon through Section 117B (6) of the NIA Act 2002.
3. At the hearing before me, Mr Alam relied upon the permission to appeal and its grounds. Ms Everett pursued a different course but directed at the correct application of a 'genuine and subsisting parental relationship' considered by the Judge, for it was common ground that at its highest the

Appellant's contact had been indirect. There was no evidence to suggest that the Appellant had taken part in any decision making as an adult parent of the child and whilst it was said that the Appellant wished to have a genuine and subsisting parental relationship, that had not yet occurred and either would be resolved through mediation or Family Court proceedings and that his willingness to have a direct parental relationship was at present frustrated by the existing judicial order made or the child's mother's conduct.

4. Ms Everett relied upon the case of SR [2018] UKUT 00334. There was no disagreement with the fact that the Appellant's conduct, over a number of years, demonstrated his commitment to playing a role as a father in the upbringing of the child.
5. At this stage there was nothing known as to the possible outcome of either the mediation or Family Court proceedings, if the former failed and clearly at this stage it would be in error to frustrate the process through the Appellant's removal. There is clear case law and guidance which indicates that the court may have to consider if the grant of leave to remain under Article 8 of the ECHR in terms of the appeal: Albeit it remained a matter of discretion for the Secretary of State how long that period to remain might be.
6. I take into account in looking at the best interests of the child but ultimately I make no assumptions as to the extent to which the father's removal is likely to have an impact upon the child and the potential significance of removal of the Appellant in terms of his continuing ability to provide support for the child at the level he does. The application of Section 117B(6) of the Nationality, Immigration and Asylum Act 2002 is clearly fact-specific and the acceptance that there is no direct contact between the Appellant and child is not the end of the matter. In the case of SR [2018] Judge Plimmer, at paragraph 36, identified by reference to the case of Secretary of State v VC that subsisting parental relationships with a child contemplates three or in that case four elements, which

involved a foreign criminal, but in respect of which it was pointed out that the relationship which is parental must be genuine and the relationship must be subsisting in the sense that it has a real existence and that simply to establish biological parentage is insufficient.

7. There must be an existing parental relationship, as was observed each of those words denotes a separate and essential element in the quality of the relationship and the parent must be in a “subsisting role in personally providing at least some element of direct parental care to the child”. The judge was under no misapprehension that the Appellant was taking any active role in the child’s upbringing nor was there evidence of the Appellant making any important decisions regarding the way in which the child was brought up, cared for and taught or directed and as was indicated, biological parental relationships were without more insufficient. There must be some element of direct parental care in order to have a genuine and subsisting parental relationship.
8. At paragraph 38 in the decision in SR, it was apparent that the level of care and involvement was significantly different from the Appellant’s case in this appeal. I bear in mind that its limitations are partly the result of a court order, wherein it is reasonable to think that the implications of greater contact were considered before the restrictions were placed upon it and necessarily parental interests would have to take into account the best interests of the child. the circumstances in which the child is residing with one of the parents and the significance of a break in or interruption to subsisting parental relationships. It is a matter of its own facts.
9. I conclude that the judge, who found family life was engaged, made no error of law in addressing the issue that the existing relationship was not a genuine and subsisting parental relationship for the purposes of Section 117B (6). I concluded that the steps that might arise in either mediation or litigation are simply beyond being accurately assessed. In the circumstances, for the purposes of enabling family life to be continued or enlarged, the Judge erred in law in failing to consider if the issue of the

Appellant's removal would or could frustrate the opportunity to establish a meaningful relationship with the child and achieve or maintain family life. It will be a matter for the Secretary of State what steps to take or what leave to grant the Appellant so long as he is actively pursuing his access to the child.

DECISION

The First tier Tribunal's decision was in error but not for the reasons given by the permission. The judge's decision contained an in error of law. The appeal is allowed to the extent that and the matter is remitted to Judge Young-Harry to redetermine it in accordance with the law and in particular to address the Article 8 ECHR issues with reference to the ongoing mediation to determine whether the Respondent should consider any period to permit the Appellant to remain in the UK to pursue the Family Court litigation.

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 their 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

Deputy Upper Tribunal Judge Davey