Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/33801/2011

THE IMMIGRATION ACTS

Heard at Bradford	**Determination Sent**
On 14th August 2013	**On 16th September 2013**

Before

UPPER TRIBUNAL JUDGE REEDS

Between

RAJA SHARAFAT KHAN

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: The Appellant in person
For the Respondent: Mrs Petterson (Home Office Presenting Officer)

DETERMINATION AND REASONS

1. The Appellant is a citizen of Pakistan born on 2nd October 1972. The Appellant appeals with permission against the decision of the First-tier Tribunal (Judge Howard) who dismissed the Appellant's appeal against the decision of the Respondent made on 14th November 2011 to refuse leave to remain in the United Kingdom based on human rights grounds (Article 8) and to give directions for his removal from the United Kingdom.

2. When this appeal was before the First –tier Tribunal no anonymity direction was either made nor was sought by any of the parties. The position has been the same before the Upper Tribunal. This case involves minors and for that reason in this determination they are referred to by their initials as is their mother.

The Background to the Appeal

3. The history of the appeal is as follows. The Appellant was arrested by the South Yorkshire Police Service on 31st October 2010 on suspicion of assault and false imprisonment. Following this on 1st January 2011, the Appellant was interviewed by immigration officials and claimed that he had arrived in the United Kingdom in 1998 as a result of fearing persecution in his home country. Following the Appellant's subsequent release by the South Yorkshire Police on 2nd January 2011, the Appellant was again encountered by immigration officials following a visit to Sizzlers Takeaway, however, no further action was taken against the Appellant due to his previous arrest on 31st December 2010.

4. On 28th February 2011, a letter was sent to the Appellant by the UK Border Agency for him to attend an interview with immigration officials on 14th March 2011 to discuss his immigration position. He attended on that day and claimed that he had arrived in the UK in January 1998. He further claimed that he had not been working at Sizzlers Restaurant when encountered by the police. He also claimed that he had left Pakistan in fear of his life and had previously submitted an application to the Home Office for asylum. As regards his life in the United Kingdom, he said that he was now estranged from his spouse, MF, whom he claimed that he had married in an Islamic ceremony but that he continued to maintain regular contact with her and the three children.

5. On 4th April 2011, the Appellant's solicitors submitted an application on behalf of the Appellant under Article 8 of the ECHR on the basis of his relationship with his three children living in the United Kingdom. Those children are H S (6th June 2006), S S (25th May 2007) and M S (25th January 2011). It was also stated he could not return to Pakistan as he feared persecution in his home country.

6. On 2nd September 2011, the UK Border Agency requested further information from the Appellant regarding his relationship with the children as no further grounds had been received from his legal representatives. The UK Border Agency also notified his legal representatives that initial claims for international protection in the United Kingdom could not be made by post, but could only be made in person by the Appellant attending the Asylum Screening Unit in Croydon. He was given full instructions on how to lodge such an application. No such application has been made by this Appellant in person in respect of a claim for asylum. Further material was produced by the Appellant via his solicitors on 23rd September 2011 with regard to the application made in April. It was reiterated that the Appellant had established a family life in the United Kingdom with his three children and that to remove him would be a breach of Article 8 of the ECHR.

7. In a notice of immigration decision dated 14th November 2011, the Respondent refused the application made by the Appellant. Those reasons were set out in a decision letter dated 14th November. In summary, the Respondent was not satisfied that the Appellant had demonstrated that family life existed between himself and his three children or that he had established family life with any other individuals. In particular, the Respondent noted that there was little evidence of claimed contact between the Appellant and his children. In order to maintain contact with them, he would have submitted an application for leave to remain on this basis sooner. His application was made only after he was encountered by immigration officials in January 2011 whilst his eldest child had been born in 2006. Accordingly it was considered that the timing of the submission of such an application after he had been apprehended by the South Yorkshire Police and served with notice of an IS151A in March 2011 undermined the overall credibility of his claims. The Respondent also considered his immigration history and did not accept that there was any record of an application being lodged prior to the submission stated in October 2011. The Respondent considered the Appellant's private life that may have been established in the United Kingdom but after considering all of those matters, the Respondent refused the application.

8. The Appellant exercised his right to appeal and the matter came before the First-tier Tribunal (Judge Howard) sitting in Bradford on 19th December 2011. The judge heard oral evidence from the Appellant only and set out a note of that evidence in précis form at paragraphs 6-8 of the determination. After considering the evidence in this case he reached the conclusion that it had not been established that there was family life in the United Kingdom between the Appellant and the three children nor that he had demonstrated that he had any meaningful or regular contact with those children in the United Kingdom. Furthermore having considered the case in the light of the circumstances set out in paragraph 395C he found nothing to conclude that removal would be unlawful in this Appellant's case.

9. The Appellant applied for permission to appeal that decision and such permission was granted on 30th January 2012 by the First-tier Tribunal (Judge Nicholson). The grant of permission reads as follows:-

> "The Appellant appealed on the grounds that the judge had ignored the law and not made a proper consideration of Article 8 on 'the case facts.'
>
> Although not raised in the Grounds of Appeal, it is arguable that the judge made errors of law in the following respects.
>
> (a) The judge accepted that the Appellant is the father of the three minor children in this county. In those circumstances, it is arguable that the judge made an error of law in asserting that there was no family life as between the Appellant and the children simply because of concerns about contact and in failing to consider the children's best interests. In **Berrehab v The Netherlands [1989] 11 EHRR 322** the European Court said that 'the concept of family life embraces, even when there is no cohabitation, the tie between the parent and his or her child ...'

(b) This finding arguably vitiates the findings under paragraph 395C of the Rules.

4. At paragraph 10 of the determination, the judge arguably erred in law in asserting that the relevant date was the date of decision, albeit that he appears nonetheless to have considered the situation as at the date of hearing.

Although I do not refuse permission on Grounds 2 to 8 they appear to be no more than an attempt to re-argue the evidence."

10. Thus the appeal came before the Upper Tribunal. The Appellant was represented by Mr Medhurst (Counsel instructed on behalf of Marks and Marks Solicitors) and the Respondent by Mrs Petterson (Home Office Presenting Officer). I heard submissions for each of the advocates and reserved my decision on the error of law. In a written decision I set out my conclusions on the issues before the Tribunal. There is annexed and marked as "Appendix 1" a copy of that decision.

11. The error of law was as follows:-

"10. It is submitted on behalf of the Appellant, relying on the issues raised in the grant of permission rather than as set out in the grounds of permission, that the judge fell into error by accepting that the Appellant was the father of three minor children but that there was no family life due to concerns of contact and not taking into account the children's best interests. Mr Medhurst relies upon the case of **Berrehab v The Netherlands [1989] 11 EHRR 322** where the court stated that "the concept of family life embraces, even when there is no co-habitation, the tie between a parent and his or her child ..." (see skeleton argument page 1 and relied upon in oral submissions). He further submits the judge fell into error by failing to consider Section 55 of the 2009 Act and that the judge failed to follow the guidance given by Lady Hale in **ZH (Tanzania)** (as cited) in ascertaining the wishes of the children which may involve separate representation or at the very least some independent investigation.

11. I have considered those submissions with care. Whilst the European Court of Human Rights has established that, from birth, a child has a bond with his or her parents which amounts to "family life" which remains in existence despite voluntary separation (see **Sen v The Netherlands [2007] 36 EHRR 7**, **(1996) Gul v Switzerland 22 EHRR 9**). However the question which arose in this case before the First-tier Tribunal was whether on the facts of this case family life existed within the meaning of Article 8(1). This is a matter of fact for the judge to decide on the evidence presented by this Appellant. The judge had the opportunity to hear the oral evidence of the Appellant himself and for that to be the subject of cross-examination and to consider that evidence in the context of the documentary evidence also produced. He gave a short précis of the oral evidence before him at paragraphs 6 – 8 of the determination.

12. There is no dispute that the principles to be applied when considering a claim under Article 8 are those set out in the well-established five-stage test in **R (Razgar) v SSHD [2009] 1AC 1119**. The judge set out those principles at paragraphs 12 to 15 of the determination. He then set out the basis upon which the issue of family life had been advanced on behalf of the Appellant. It is

important to set out those factual findings that the judge made at paragraphs 16 to 17 of the determination. The judge said this:-

> "16. The family life advanced here is predicated upon three core facts. The first that he is married to MF. The second that they have three children and the third that they are in regular and meaningful contact with one another. The Appellant and MF met in 2003 and married in 2005. There is no document to support the fact of the marriage and the 'unregistered' nature of the union is cited as a reason why they do not co-habit. The Appellant is named as the father on the birth certificates of the two older children, but not the youngest. Again the 'unregistered' status of the marriage is cited as the explanation. I have evidence in photographic form of the Appellant in company with a woman and three children in a domestic setting and a letter purporting to be written by MF dated 9th September 2011. The only evidence that they are MF and the children comes from the Appellant. Ordinarily that would not be of concern, however given the absence of any input from her or those children in any other aspect of the case causes concern on my part as to those actually in the photographs and who wrote the letter. He has also produced some bills to show purchases by him in the Slough area. What is entirely absent in this case is any evidence of contact between the Appellant and his family. I have nothing from either the mother of the children or the children themselves to say what their relationship with the Appellant is. As for the Appellant his evidence of contact with his family is wholly unconvincing. He lives miles away from them when there is no real bar to his living much closer. There is not a single document which evidences any involvement in the children's welfare or education. Evidence of any involvement in their collective life on the part of the Appellant is absent. In short the Appellant has failed to satisfy me it is more likely than not that he currently has any family life with MF and the three children. The most I can conclude from the evidence is that in the recent past the Appellant has been in a relationship with her that has borne her three children.
>
> 17. It is against this factual background that I must decide whether the decision of the Respondent was proportionate and therefore lawful. I am satisfied the decision of the Respondent does not interfere in the Appellant's family life, as the Appellant has not satisfied me that there is any family life."

13. It had been the Respondent's case (as set out in the decision letter of 14th November 2011) that the evidence produced did not demonstrate that the Appellant maintained a level of contact with the three children as claimed citing concerns regarding the content of a short letter purportedly sent by the mother of the children and that there was no other cogent evidence of contact with the children either from themselves or from relatives of the children/mother. Thus it was not accepted that the evidence demonstrated that he had established close and frequent contact with the children as claimed. The Respondent also relied upon his immigration history citing the point that if he had genuinely wished to remain in the UK for the children then he would have submitted an application

for leave to remain on that basis before being encountered by immigration officials in March 2011 (the eldest child having been born in 2006). The submission of the application only after being apprehended by the police undermined the overall credibility of his claimed family life.

14. The judge considered the "three core facts" which were advanced on behalf of the Appellant before the First-tier Tribunal. As to the first fact, that he was marred to MF, the judge considered the oral evidence given by the Appellant in which he had claimed that he and his wife did not co-habit because of the "unregistered nature of that union." This is also the explanation given as to why he named on the birth certificate of the eldest two children but not the youngest. The judge found as a fact that there was no documentary evidence to support the Appellant's evidence of there being such a marriage or the "unregistered" nature of the union. However in respect of the second core fact he accepted that the Appellant was the father of the three children concerned. In respect of the third core fact "that the children are in regular and meaningful contact with the father," the judge considered the evidence before the Tribunal. That consisted of the oral evidence of the Appellant, the photographs produced, copy bills/receipts produced and the letter from MF dated 9th September 2011. As regards the cogency of the photographic evidence, he noted that "I have evidence in photographic form of the Appellant in company with a woman and three children in a domestic setting and a letter purporting to be written by MF dated 9th September 2011. The only evidence that they are MF and the children comes from the Appellant. Ordinarily that would not be of concern, however given the absence of any input from her or those children in any other aspect of the case causes concern on my part as to those actually in the photographs and who wrote the letter." He gave consideration to the receipt/bills produced to show purchases in the Slough area. Those bills were in the Appellant's bundle; some were undated (tasting hut). Others related to food bills, a car phone warehouse, receipts from 2011). However the judge found that the most significant feature in his analysis of the evidence was a dearth of evidence concerning contact between the Appellant and the children. As the judge noted;-

> "What is entirely absent in this case is any evidence of contact between the Appellant and his family. I have nothing from either the mother of the children or the children themselves to say what their relationship with the Appellant is. ... There is not a single document which evidences any involvement in the children's welfare or education. Evidence of any involvement in their collective life on the part of the Appellant is absent."
>
> The judge went on to find that the evidence of the Appellant himself was "unconvincing" and importantly there was not a single document which evidenced any involvement in the children's welfare or education and that evidence of any involvement on the Appellant's part was absent from their collective life. It was on this basis that the judge, whilst accepting that in the recent past he had been in a relationship with MF and she had borne three children, that was not the current position and that he currently had no family life with MF or those three children.

15. I have considered with care those findings of fact in the light of the evidence that was produced before the First-tier Tribunal. I am satisfied that those findings of

fact were made on the basis of all the evidence that was before the First-tier Tribunal and I am equally satisfied that the judge in reaching those conclusions, which were adequately reasoned, were ones that were entirely open to him on the evidence. The grounds submitted on the Appellant's behalf in this respect amount to no more than a disagreement with the conclusions that the judge reached having had the opportunity to hear the oral evidence of the Appellant and against the background of the documentary evidence produced.

16. In considering this appeal I have also borne in mind the decision of **MA (Somalia) [2010] UKSC 49** in which Sir John Dyson SCJ at paragraph 43 reiterated the remarks of Baroness Hale in **AH (Sudan) v SSHD UKHL [2008] 1AC 678** in which she urged caution upon the part of Appellate Tribunals when dealing with decisions of the lower courts. At paragraph 45 Sir John Dyson stated:-

> "The court should not be astute to characterise as an error of law what, in truth, is no more than a disagreement with the AIT's assessment of the facts. Moreover, where a relevant point is not expressly mentioned by the Tribunal, the court will be slow to infer that it has not been taken into account."

17. The judge did not make specific reference to Section 55 of the Borders, Citizenship and Immigration Act 2009. That section came into force on 2nd November 2009 and the decision in **ZH (Tanzania) [2011] UKSC 4** explains the duty imposed by Section 55. In the decision **TS [2010]** the duty under Section 55 is described as thus:-

> "To safeguard and promote the welfare of children who are in the UK. Guidance was issued entitled 'every child matters' stating, 'in accordance with the UN Convention on the rights of the child the best interests of the child will be a primary consideration (although not necessarily the only consideration) when making decisions affecting children."

18. In the light of the decision of **ZH (Tanzania)** it is more accurate to say that the best interests of the child will always be a primary consideration, but that those interests may be outweighed by other considerations. Lady Hale emphasised "a primary consideration" is not the same thing as the 'paramount consideration' as found within the Children Act 1989." The Respondent in the decision letter of 14th November 2011 had made reference to Section 55 of the 2009 Act at paragraph 33. Whilst the judge did not make specific reference to that section, in the decision of **AJ (India) [2011] EWCA Civ 1191** Pil LJ stated that the absence of a reference to Section 55(1) is not fatal to a decision. "What matters is the substance of the attention given to the 'overall wellbeing' (Baroness Hale) of the child."

19. The primacy of the interests of the child should be considered in the context of the particular family circumstances. Mr Medhurst submits that the judge fell into error by not having in mind the primary interests of the children and in particular that he did not ascertain the wishes and feelings of the children concerned in this case as identified by Baroness Hale in **ZH (Tanzania)**. I have considered the evidence submitted on behalf of the Appellant before the First-tier

Tribunal which was his opportunity to put before the judge all the evidence relevant to the application made to remain in the United Kingdom on Article 8 grounds and in particular his claim that he had established family life with his three children with whom he enjoyed a relationship and one of meaningful contact. It is clear in my judgment that the First-tier Tribunal focused upon the interest of the children concerned but reached the conclusion after careful consideration of the evidence produced before the First-tier Tribunal that there was a dearth of evidence relating to the issue of meaningful contact and the relationship between father and children. The Appellant had the opportunity to provide evidence in this application to support his account of his relationship with the children. The time to present that evidence was before the First Tier Tribunal. The judge identified, rightly in my judgment, that he had no evidence from the children themselves or from their primary carer MF to even begin to ascertain the wishes and feelings of the children (I refer to paragraph 16 of the determination). Whilst Mr Medhurst submits that the judge should have ordered separate representation for the children, there was nothing upon which the judge could even base such a process. The burden of proof is on the Appellant to produce the evidence to the Tribunal and the judge clearly identified what he considered to be significant evidence which had not been produced. He specifically identified that absent from the case was evidence of contact between the Appellant and the children and in particular nothing from the children themselves or their mother describing the relationship between themselves and their father. Importantly the judge identified that there was not "a single document which evidences any involvement in the children's welfare or education." Having considered the bundle of documents, there is no evidence from their schools, any evidence from the mother as to the part he plays in their welfare, there is nothing in his statement as regards specific evidence of their welfare. In the light of the dearth of such evidence dealing with the matter that went to the heart of the issue, in my judgment the judge was entitled to reach the finding that he did that whilst he had in the past been in a relationship with MF and three children had been born, he was not currently enjoying a family life with them and that he had not discharged the burden upon him to demonstrate that he had maintained any meaningful or regular contact with those children. In those circumstances I am satisfied that the judge did not err in law in his consideration of the issue of family life under Article 8 of the ECHR.

20. The second point raised relates to the judge's failure to deal with the Appellant's private life. Mr Medhurst submits that despite the Appellant being resident in the UK for fourteen years and having provided evidence before the judge in this regard, the First-tier Tribunal did not deal with this issue at all. Miss Pettersen submits that whilst there was no reference to this in the determination, the case was really advanced only on the basis of his family life with the children and thus there was no error of law.

21. I have considered those submissions in the light of the determination of the First-tier Tribunal. The decision letter of the Respondent deals with the issue of private life, (as distinct from the family life arguments raised) at paragraphs 30 to 32 of the decision letter. Whilst it is submitted that the Appellant had been in the UK for fourteen years, it is clear that there was a dispute between the parties and the Respondent clearly identified this dispute in the lack of acceptance that the Appellant had been resident in the UK for that period of time citing the lack of

evidence relating to this and the fact that in 2002 a passport was issued to this Appellant in Mirpur, Pakistan on 29th March 2002 which was inconsistent with his claim to have entered the UK in January 1998. Furthermore, his immigration history was referred to and that there was no evidence that he had made any application to remain in the UK prior to being apprehended in March 2011.

22. The Appellant had produced letters from solicitors in this respect and also letters from friends concerning the nature of the private life that he had established. However, the determination of the First-tier Tribunal did not deal with any of those issues and there was no reference to the private life of the Appellant whatsoever. The judge did not resolve any issues of fact relating to the length of time that he had been in the UK nor the issue of delay raised on behalf of the Appellant based on the disclosure of albeit limited evidence from legal representatives that he had made an application before that in March 2011. In those circumstances, I am satisfied that the judge made an error by not dealing with the aspect of the Appellant's private life raised by him. Consequently, there will be a resumed hearing in respect of this issue only. For the foregoing reasons, I have set out that I am satisfied that the judge made no error of law in considering the issue of family life for the reasons given and therefore the findings of fact made by the First-tier Tribunal and that part of the decision shall stand. Whilst in the skeleton argument it is submitted that the case should be "remitted for a separate full hearing on the merits," I consider that the decision requires to be re-made dealing with the issue in which the error of law has been demonstrated, namely the issue of the Appellant's private life. Therefore a hearing will take place in accordance with the accompanying directions."

The Resumed Hearing:

12. The resumed hearing was listed on the 20th February 2013 but the hearing was adjourned as Counsel, Mr Lams, was unable to travel from London due to transport problems.

13. The matter was listed on the 27th June 2013. At this hearing the Appellant was represented by Mr Lams. At that hearing, Mr Lams stated that he had not seen the decision that been issued concerning the error of law and the ambit of the resumed hearing. In those circumstances he sought further time to take instructions. Upon further enquiry, Mr Lams stated that there was further evidence that the Appellant would wish to place before the Tribunal that had not been the subject of any Rule 15(2A) Notice nor had that evidence been disclosed to the Tribunal or the Secretary of State. That evidence consisted of further photographs and video clips relating to the children and phone calls on his telephone. Mr Lams could not provide any dates for that evidence or any further details of it. Having taking instructions, he requested an adjournment for that information to be ascertained and that he would wish to address the issue of the public statement and the difference between the two letters and would require the opportunity to put forward further evidence concerning the issue of the relationship between the children and the Appellant.

14. Mr Lams submitted that whilst the Tribunal had only found an error of law in respect of the issue of private life and that the Upper Tribunal had found the First-

tier Tribunal's decision was sound concerning the issue of the family life between the Appellant, his former partner and children, the Tribunal still retained jurisdiction at the resumed hearing to reopen the issue concerning contact with the children and hear further evidence concerning that relationship. Having taken instructions, the Appellant had further evidence that he would wish to provide in this respect but had not been produced.

15. Having considered the ambit of the proceedings and the submissions made by Mr Lams, I considered that it would be open to the Tribunal to hear further evidence concerning the Appellant's family life (children) as it seemed to me that it would be artificial to consider the issue of private life without considering the Appellant's ability to have a relationship with others and that would include those of the children. I made it clear to the parties that the findings of the First-tier Tribunal would remain and that I would have to consider any evidence produced post-dating that determination concerning the relationship between the Appellant and the children.

16. Mr Diwnycz submitted that he was not in a position to go ahead given what was said about the public statement and sought further time to take instructions on the public statement.

17. I observed that it was regrettable that despite this case having been listed that Counsel had not been provided with the correct documentation. In any event, it now appeared that neither side were ready and in the interests of justice the matter would be adjourned to be relisted on a future date.

The Hearing on the 14th August:

18. Thus the appeal was listed on 14th August. At this hearing the Appellant appeared unrepresented. The Respondent was represented by Mrs Petterson, Home Office Presenting Officer. In the intervening period, despite directions being served upon the Appellant's solicitors, no Rule 15(2A) Notice had been served. There was a letter sent to the Tribunal that the Appellant would be representing himself before the Tribunal. However no documentation or Rule 15(2A) Notice was served with that letter nor was there any compliance with the directions.

The Evidence:

19. The Appellant produced to the court a handwritten letter accompanied by some documentation in a bundle dated 24th July 2013. The bundle consisted of an album of photographs, a DVD which was said to have video clips on it, a letter from Howells Solicitors relating to a contact application to be made, some new receipts, and telephone bills, an amended copy of a birth certificate.

20. As the Appellant was unrepresented, and despite there having being no compliance with the directions in this case, I considered that it was in the interests of justice to consider those documents. Mrs Petterson had a copy of them and had the opportunity to read them. As regards the video clips which had been taken from a

mobile phone, they had been a subject of some discussion at the last court hearing when it was made clear that a transcript and summary of such material should be provided in the event that the Appellant sought to rely upon it. Despite the bundle of documents that the Appellant himself provided, that had not been complied with and there was simply a DVD. Nonetheless, the Tribunal did view that DVD/CD which had some clips upon it. I will refer to that evidence in due course.

21. As to other evidence before the Tribunal, the original bundle that had been placed before the First-tier Tribunal remained on file as did the bundle of documentation produced for the application for permission under cover of a letter dated 12th November 2012 which had documents up to 250 pages including a statement of the Appellant.

22. On behalf of the Respondent, a further letter had been served along with a Rule 15(2A) Notice which was a witness statement from an Immigration Officer from the Enforcement Team who had had a conversation with MF. The circumstances of that conversation and the evidence in respect of that were set out in a Criminal Justice Act witness statement. The Respondent also relied upon the earlier Respondent's bundle that was in the Tribunal file and a copy of a public statement made by MF.

23. As the Appellant was unrepresented, I ensured that he could understand the court interpreter Mr Mohammed Maroof and that they were speaking in the Urdu language. I was satisfied from questions asked to both the interpreter and the Appellant that they both understood each other and that throughout the proceedings that continued to be the position and it was not brought to my attention at any time that there were any problems with the interpretation.

24. I also ensured that the procedure that would be adopted was explained to the Appellant at each stage of the proceedings in order that he could play a full and active part in them. When the Presenting Officer gave her submissions, I ensured that she gave those submissions at a slow pace to enable the interpreter to interpret those submissions fully and also gave Mr Khan the opportunity to make notes of those submissions which he did in order to assist him in making his own submissions or summary at the conclusion of the case.

25. The Appellant confirmed that the statement that he had given previously in the proceedings at pages 14 to 18(a) was correct and truthful when he made the statement. He confirmed that there was no up-to-date statement. In respect of the letter in the most recent bundle from Howells Solicitors dated 22nd July, he stated that he had seen solicitors for the first time on 15th July 2013 to make an application for contact to the children. He said that he had waited until 22nd July to make the application. He said that he was in regular contact with his wife and children but that there was certain pressures on the family if they continued to see him. He said that there were "financial" measures in place that would be taken away and pressures had been placed on the wife from professionals working with the family. When asked to describe the professionals who were working with the family, the Appellant stated that they were the "social services". When asked why the social

services were working with the family, he said "I don't know why they are involved". He said that he knew that social services were involved because "my wife tells me everything and she had told me". He said that she had told him that social services had said that if he stayed with the family the likelihood was that they would take the children away from her. When asked why that had been said, he said "I am not permitted to work and I cannot support the family and there are financial measures that will be taken away but I do support the children". When asked to explain further about the claim that he made that the social services were going to take away the children, he said that his wife herself did not know the reasons why they would take the children away but they would not let them live together.

26. The Appellant was asked to give a history in his own words concerning the relationship with his wife and when or if they had ever separated. The evidence from the Appellant was that they had never separated but she lived in Slough and he lived in Sheffield and he confirmed that he was still in a relationship with his wife and it had never ended. He said that he had contact with the children. There was no arrangement in place but he would get the coach from Sheffield to London. He says he would have contact when it was feasible for both of them but that he is now going through the court because the judge had said previously that there was no contact and he wanted to show that there was contact. When asked why there was no evidence from his wife about contact the Appellant claimed that she was fearful of providing any evidence because of the social services.

27. In respect of the bundle of photographs, they had already been produced previously in the evidence before the First-tier Tribunal. He invited the court to look at the first photographs and confirmed that he had not dated any of them. The first few were pictures in a park. He said they were taken two or three months ago. One of them showed the Appellant holding a baby and he said the baby was born on 15th January 2010. When asked how that picture could have been taken two or three months ago when the baby was born in 2010, he changed his evidence to say that in fact the pictures were not taken two to three months ago and therefore must have been taken some time soon after January 2010. Other photographs taken of the Appellant's eldest daughter he said were taken in 2007.

28. In respect of the telephone bills, he said that they had been produced to show that they were in regular contact. He confirmed that there was no independent evidence to show his wife's mobile telephone number. He said that she had had a particular mobile number since August 2012 but before that he could not remember what kind of phone she had or her number.

29. As to receipts, he referred to a receipt for April 2013 for Argos which showed a washing machine. He said that he bought that to give to the family because their washing machine had stopped working. In respect of the job offer that was in the bundle, (a job offer from the same potential employer had been provided in 2010) he said that he had been offered administrative work stating that he knew a number of languages and that students coming from overseas would have problems and he

would be able to interpret for them. He said he had no qualifications in interpretation but he could do that work.

30. The Appellant was asked to provide reasons in his own words as to why he wished to stay in the United Kingdom. The Appellant said that he had come to the United Kingdom fearful of his life and that he now had three children and a wife and wished to remain. He said he had nothing left in his homeland having brought all his assets with him. He said that he had bought a house in Sheffield and if he was permitted to work he would do so and support the family. He did not want to be reliant on public funds.

31. In cross-examination he was asked about his claim for asylum in 1998 which he said he had made. He was asked if he had gone to the Home Office to make the application or to the solicitors. The Appellant said that he had gone to the solicitors. It was put to him that when his solicitors had submitted original Grounds of Appeal (page 240) it is stated that he had claimed asylum on arrival at Gatwick. He was asked which was the correct version. The Appellant denied ever applying for asylum on arrival and that the first thing he said he did was to see his solicitors. The Appellant was asked about the birth of his daughter, he claimed that he was present at the birth of his daughter and present at the birth of his son and pointed to a photograph of January 2010. He was asked about his evidence concerning social services and when they had first become involved with his wife and children. He said that they had first become involved in March 2011 when he started proceedings for this case and an application for Article 8. He was asked why the social services had become involved. He said "I do not know the reasons why". He was asked about the children who were living in Slough. He said for the past two years he had gone to visit but did not stay overnight. He was asked when he did stop living in Slough and he said at the end of 2011.

32. In respect of the Argos receipt for a washing machine, he was asked, why if it was for his family it was delivered to Sheffield and not to Slough. The Appellant claimed that he had gone to the Argos store and asked them to deliver it to Slough but they could not so he had to deliver it himself. It was put to him that he would be able to order it from Argos in Slough if that was the real problem. The Appellant claimed that he had ordered it but it would take a few days to deliver it as the family lived in a tower block he would have to put the machine on and know that it was done right. When asked how long it was taken to install, he said he bought it on 2nd July but he did not go until 18th July to deliver it. It was put to him that the reason that he had given delivering to Sheffield was to save time but that that was not supported by his account that he had waited two weeks before he had taken it.

33. In terms of the length of time that he had been in the United Kingdom he was asked about the passport application that he had made in Mirpur in 2002. It was put to him that when he was interviewed about this and how a passport had been issued to him in Pakistan if he had been resident in the UK since 1998, he was unable to answer this. The Appellant said that that was not accurate. He said that he did give an answer and that he was present in the UK but the solicitor said he needed a valid

passport because he could not make an application so he got a friend in Pakistan to make an application for a passport on his behalf.

34. The Appellant was then asked about the letter dated 9th September 2011 which purportedly supported his application. It was put to him that the new evidence taken from the Immigration Officer which recorded a conversation between MF and the Immigration Officer demonstrated that she had never written that letter. He was therefore asked why he was claiming the relationship was subsisting? The Appellant said that that letter was written under duress and by fear of threats that she would lose her children. He was asked who had put his wife under duress and he claimed that it was pressure from the social services and that there were other people present on that occasion. When asked who those people were, he said that she was crying but she did not know who they were those people with the social services but he thought that they were from the same department. He was also asked about the letter that she had written to the Home Office by way of a public statement in 2012. He stated that that letter was also made under duress for the fear of losing her children and the council house that she lived in. He was asked why that would mean she would lose her house and children but the Appellant said that he did not know the reason and claimed that there was an occasion when social services had stayed until midnight to see if he was coming and this happened just a month ago.

35. The CD that the Appellant had produced had not been served upon the Home Office. Mrs Petterson sought for that evidence not to be admitted. I asked the Appellant what was on the CD/DVD. He said that there was evidence of him and his wife collecting the children in 2010. When asked what the latest date was in 2010, the Appellant then said it was not just 2010 but 2011. He then stated that the evidence was from 2012 and that there were seven clips in total showing recent evidence.

36. I noted that the CD/DVD had not been served upon the Respondent but I considered that that was evidence that was relevant and that the Tribunal could view it as it was not lengthy. The CD/DVD consisted of some clips which were taken from, I understand, the Appellant's mobile phone. The first clip showed the Appellant driving a car. He claimed that this was taken in 2010 and it showed him and his wife. He could not remember when in 2010 whether May or June but he had gone to collect the children from school. The second clip was the children being brought to Sheffield in 2009. The third clip shows that the Appellant claimed was taken in 2011 showing his youngest son. He said that it was taken probably before March 2011. When asked what made him say it was March 2011, he said he remembered because he had come to see him. The last clips were also taken of the young son in the bedroom. Whilst he claimed that he was not sure if it was taken on the same day, it is abundantly clear from those clips that they were all taken on the same day as it shows the woman with the child wearing the same clothes on all three clips. The child also was wearing the same clothing and it was taken in the same place. That was the evidence from the CD/DVD.

The Submissions:

37. At the conclusion of the evidence I heard submissions from each of the parties. Mrs Petterson on behalf of the Respondent submitted that this Appellant had not been a credible witness and that the explanations that he had given in his evidence as to why the letters from his wife were made under duress and pressure from the social services to ensure that he did not have contact with them, were not supported by any evidence nor had any such claim been made before in the previous two years of the proceedings. She invited the Tribunal to place weight on the Immigration Officer's statement and the fact that MF had made a public statement in 2012 stating that the relationship between the Appellant and children was not subsisting and referred to his violent behaviour. Both those documents, which are recent, demonstrate that there is no relationship either with her despite his claim in the evidence today nor with the children. The evidence provided did not demonstrate that he had any meaningful relationship with the children. None of the photographs are particularly recent and there is no independent evidence that they are of the Appellant's former partner and children. The photographs were not dated. His claim to be pursuing contact has now been made in July 2013 and has been made in order to delay his removal. His explanation as to why he had delayed stating that it was because of the difficulties with the social services, his evidence was that he had known about this since March 2011 thus it had been open to him to go through the courts at a much earlier date. This would give the court an opportunity of clear reasons as to why he could not live in the same house as the children and partner. Nonetheless there is no evidence before this court to support this claim concerning the social services and the claim that the partner was coerced into the writing of the letter should be disbelieved.

38. She submitted that any family life with the children is entirely tenuous. Although now he is attempting to go to the family court, he has been on notice since 2011 that he has not been allowed to see his wife and children but has not taken any opportunity to do that, thus having now applied two years down the line adds little credence to his claim that he wants to be in the UK with his children. Whilst it was submitted there was no family life between the father and the children or in the alternative, any removal would be proportionate. There would be nothing to prevent him from proceeding with contact proceedings out of country or to apply for entry clearance as the father of a settled child.

39. As to his private life, the evidence does not demonstrate that he arrived in 1998. There was considerable doubt about the date of arrival. His evidence was inconsistent and has been unbelievable. He claimed asylum at the airport but now claims that he applied with solicitors. There is no record of him making any claim until April 2011. He did not surface until he was arrested in 2011. He would not have met the fourteen year threshold in any event because the "clock stopped" in 2011. He would not meet the new Rules either relating to private life as he did not meet the twenty year threshold and the doubts that he severed all ties with Pakistan. The private life is not significant. The letters from the friends, although have not given oral evidence, do not demonstrate deep strong friendships that outweigh the

proper operation of immigration control. There is nothing exceptional compassionate circumstances as to why he could not return back to Pakistan and establish his private life there. Therefore the application should fail.

40. Mr Khan was provided with notepaper so that he could make any notes during Mrs Petterson's summary of the evidence. Having done so he made the following oral submissions from those notes. He said that he has always provided evidence that he was involved with the children. He said that the first Immigration Judge said that he was not named on the third birth certificate. He therefore went and got himself named on the birth certificate. He therefore submitted that he was seeing his wife and that the birth certificates were evidence that he was in contact with the children. He said that he was telling the truth. He submitted that he and his wife had got into an argument that the neighbours had called the police and his wife had then withdrawn the complaint that that not a reason why he could not see the children. He said that the argument had taken place at the beginning of 2011. He said that he had not been properly represented and had not been made aware that certain things needed to be done. He could not get the CD/DVD transcribed as it would cost extra money. He submitted that whilst it had been said there were no compelling circumstances, that if he were removed from the UK it would affect his children and they have not been asked how they would feel if their father left the country. He said he came to the UK because he feared for his life if he was made to return to Pakistan. He said that he had been told that he had obtained fourteen years' residency and therefore he could stay in the United Kingdom and would wish to do so. Even if there was a shortfall it was a very long time to be in the United Kingdom. He said he had never been a burden on the state and had been present in the United Kingdom and had contributed by bringing assets with him. He said he had never worked illegally in the UK. He further submitted that his children were very long and not been asked how they feel and that he should remain in the country until the contact application had been heard. Whilst it was said he could leave the country and make an application if that was made he would never be able to meet the financial requirements. He said that he had brought all his assets with him to the United Kingdom and therefore he could not return to Pakistan and stay there. He said that he fled from the ISI in Pakistan (the internal police forces) and if made to return he would be apprehended by the ISA and there are 900 cases of missing people in Pakistan. He had come to seek safety for his life and would like an opportunity to do so.

41. At the conclusion of the hearing I reserved my decision.

Assessment of the Evidence and Findings of Fact

42. It is plain from my earlier decision relating to the determination of the First-tier Tribunal (Judge Howard) who heard this Appellant give evidence and considered the documents produced on his behalf, that the findings of fact made were ones entirely open to him upon the evidence that was before him. The judge's findings are set out at paragraphs 16 to 17 of that determination. They are as follows:

> "16. The family life advanced here is predicated upon three core facts. The first that he is married to MF. The second that they have three children and the third that they are in regular and meaningful contact with one another. The Appellant and MF met in 2003 and married in 2005. There is no document to support the fact of the marriage and the 'unregistered' nature of the union is cited as a reason why they do not co-habit. The Appellant is named as the father on the birth certificates of the two older children, but not the youngest. Again the 'unregistered' status of the marriage is cited as the explanation. I have evidence in photographic form of the Appellant in company with a woman and three children in a domestic setting and a letter purporting to be written by MF dated 9th September 2011. The only evidence that they are MF and the children comes from the Appellant. Ordinarily that would not be of concern, however given the absence of any input from her or those children in any other aspect of the case causes concern on my part as to those actually in the photographs and who wrote the letter. He has also produced some bills to show purchases by him in the Slough area. What is entirely absent in this case is any evidence of contact between the Appellant and his family. I have nothing from either the mother of the children or the children themselves to say what their relationship with the Appellant is. As for the Appellant his evidence of contact with his family is wholly unconvincing. He lives miles away from them when there is no real bar to his living much closer. There is not a single document which evidences any involvement in the children's welfare or education. Evidence of any involvement in their collective life on the part of the Appellant is absent. In short the Appellant has failed to satisfy me it is more likely than not that he currently has any family life with MF and the three children. The most I can conclude from the evidence is that in the recent past the Appellant has been in a relationship with her that has borne her three children.
>
> 17. It is against this factual background that I must decide whether the decision of the Respondent was proportionate and therefore lawful. I am satisfied the decision of the Respondent does not interfere in the Appellant's family life, as the Appellant has not satisfied me that there is any family life."

43. It is clear that the Respondent's case was that the evidence had not demonstrated that the Appellant had maintained a level of contact with the three children as claimed and cited concerns regarding the short letter purportedly sent by the mother of the children and that there was no other cogent evidence of contact with the children from they themselves or from relatives of the children/mother. Thus the position was that it had not been established a close or frequent contact with the children as claimed.

44. Also in respect of his immigration history, it was observed that if he genuinely wished to remain in the UK for the children, that he would have submitted an application for leave to remain before he was encountered by Immigration Officers at Sizzlers in 2010 bearing in mind that the first child was born in 2006. Thus the timing of the application undermined the overall credibility of his claim to be in a relationship with these children.

45. It is also plain from the determination of Immigration Judge Howard that he considered three core factors set out at paragraph 17. The judge did not accept the

Appellant's evidence concerning the "marriage" and the "unregistered" nature of the union as the reason why this Appellant had claimed the parties did not cohabit. He accepted that the Appellant was the father of three children but he did not accept that the evidence demonstrated that there was family life between the children and the Appellant on the evidence. The judge considered the documentary evidence, the photographs, the copy bills/receipts and a letter from MF dated 9th September 2011. Having considered that evidence, the judge found that the most significant feature in his analysis of the evidence was a "dearth of evidence concerning contact between the Appellant and the children". As the judge noted,

> "What is entirely absent in this case is any evidence of contact between the Appellant and his family. I have nothing from either the mother of the children or the children themselves to say what their relationship with the Appellant is. … there is not a single document which evidences any involvement in the children's welfare or education. Evidence of any involvement in their collective life on the part of the Appellant is absent."

The judge went on to find that the evidence of the Appellant himself was "unconvincing". Consequently he found that whilst he had been in a relationship with MF and that she had borne him three children, that was not the current position that he had no family life with her or the children.

46. I reached the conclusion previously that those findings were entirely open to the judge for the reasons given and the evidence before him. Those findings therefore remain but I have heard further evidence from the Appellant concerning his "family life" in the context of his relationship with MF and the children. In this respect, I have had the opportunity to hear the oral evidence of Mr Khan and for that to be the subject of cross-examination by the Presenting Officer. I have considered that evidence in the light of the documents provided including the public statement made by MF which post-dated the First-tier Tribunal hearing and a statement from an Immigration Officer made on 25th July 2013. I have also seen a CD/DVD and have been provided with other documents including a letter from Howells Solicitors.

47. I observe that having considered that evidence and having heard the oral evidence of this Appellant, I have reached the conclusion that he is not a credible witness, that he has been untruthful and he is unreliable in a number of important respects and that I cannot place weight on his evidence in any material respect. I shall set out my reasons for reaching that view from my assessment of the evidence.

48. I first turn to the relationship between the Appellant, MF and the children. The First-tier Tribunal Judge found that in respect of the alleged marriage or the unregistered nature of the marriage that the Appellant had not demonstrated that that was a reason why they did not live together (see paragraph 17 of the First-tier Tribunal decision). The evidence given by the Appellant to the First-tier Tribunal that was rejected for sound reasons, was that they had not been living together because of the unregistered nature of their union. In his interview he claimed that she had not been divorced and therefore they could not live together (question 22). In his oral evidence before the First-tier Tribunal, he said she had lived in a council flat and the

council would not let him live there. Thus there were a number of reasons why he claimed he could not live with her. The judge was not persuaded that there was any documentary evidence to support any of those reasons as to why the parties do not live together. Similarly before this Tribunal, there remains no cogent evidence to demonstrate why, if these parties are in a relationship which is the evidence of this Appellant before the Tribunal now, as to why they do not live together. He claimed in his evidence before this Tribunal that they had lived together until 2011. There is no evidence of any kind to demonstrate that they live or have lived together at any time in Slough.

49. The Appellant maintains that his relationship with MF presently continues as a subsisting relationship. I have considered this evidence. A letter was produced before the First-tier Tribunal purportedly from MF dated 9th September 2011. This was relied upon by the Appellant to demonstrate that he has a continuing relationship with his wife and children. That letter which purported to be from MF made reference to Mr Khan being

> "a very good father to their children. He takes too much care for the children, too much in love with them". He tried his best to fulfil their ambitions. He often coming to see us together with us. He also buys us things according to the choice of the children. He got a big car for me to take the children to school. They always anxious to see their dad …"

50. Immigration Judge Howard referred to that letter at paragraph 16 of the determination when considering the evidence. The judge was concerned about the evidence in photographic form of the Appellant in company of a woman and three children in a domestic setting. He observed that ordinarily that would not be of any concern but given the absence of any input from the wife, it is plain that it caused this judge concern as to who it was depicted in the photograph and as he stated, who it was who wrote that letter.

51. The judge's view of the letter portrays a sense of disquiet as to whether or not it was written by the Appellant's partner/wife. The judge was right to be concerned about this letter. The Tribunal has before it a witness statement from an Immigration Officer, dated 25th July 2013. It is clear from the Criminal Justice Act statement that she has produced that has been served, that she conducted a telephone interview with MF to establish whether the letter of 9th September 2011 was written by her. That interview was conducted on 9th July 2013 and it is clear from the contents of the witness statement that MF denied writing that letter. The letter was faxed to her so that she could read it to ensure that she had referred to the right letter. The letter was subsequently faxed back by her and it was written on the letter "I did not write the letter". She then signed and dated the letter.

52. In cross-examination the letter was put to the Appellant and asked why, in the circumstances, did he continue to maintain that the relationship was subsisting? He said that it was a letter written under "duress" by MF under fear of threats of losing her children.

53. That is not the only evidence from MF stating that that he was not having a relationship with her or with the children. The other evidence is in the form of a public statement. On 19th September 2012 MF made a public statement to the Home Office. This is a letter given by an individual in the knowledge that it will be disclosed to the Tribunal and to the other party. They give such consent in the knowledge that such a public statement will be made available. That letter made by way of public statement says this:-

> "I MF confirm Raja Sharafat Khan does not live with us, he does not want to live with me and my children, he does not support me and my children. He does see his children nor take any active role in their upbringing or well-being. He doesn't provide any financial support to me and my children. He is much too claver and liar, he always try to deceive betray me, his behaviour is very bad and violent with me and my childs. My children dislike him and do not want to see him. I never support him for his stay to remain in the UK. I again confirm that all above is true."

The letter is then signed and dated as is the public statement.

54. The Appellant claims that he has frequent contact with all three children with the consent of the mother. He also claims that his wife supports his contact with the children. When he was asked why, if that were true, why there was no evidence from her, he claimed that she was fearful of the social services who would take back financial support and would also remove the children from her.

55. It is the Appellant's account that the public statement was written under duress. He claims that it was to ensure that he did not have contact with her and the children. When asked why the social services took that view, he claimed not to know despite earlier in his evidence stating that he was in day-to-day contact with his wife.

56. There is no evidence in support of such a claim. His claim that he was in frequent contact with the children with the consent of his wife, is inconsistent with the evidence from his wife herself. The letter in November 2012 by way of the public statement made her position entirely clear.

57. The public statement was written in the knowledge that it would be served and filed with the Tribunal. It clearly states that there is no ongoing relationship between the Appellant and MF nor did he have any role with the children. I consider that the fact that she was able to make a public statement in the knowledge that he would be made aware of its contents, and gave her consent to the same, does not demonstrate that they were the actions of a woman under duress. There is no sensible explanation or any cogent evidence in support of why she would be under duress or why social services would be taking such action. Despite these proceedings ongoing since 2011 this is the first time that any reference has been made concerning the social services being involved. I find that it has not been established that the letter was written under duress and find on the balance of probabilities that the public statement was written by MF setting out the nature of the relationship between the Appellant, M and the children. The only sensible inference to be drawn from the recent communication with the immigration officer is that the letter of September 2011 was

not written by her. I have no reason to doubt that the statement given to the Immigration Officer by MF in July of this year was not truthful. I do not accept that she was under duress by the social services to say that she had not written the letter. Thus the fact that such a letter was produced undermines the credibility of his claim to be in a relationship with the children and also undermines his credibility as a witness of truth.

58. I have also considered other evidence provided by the Appellant to support his claim that he has meaningful contact with the children. That consists of receipts, bank statements, groceries and other items, photographs, a mobile phone bill and the DVD.

59. The receipts were considered by the First-tier Tribunal and are set out in the original bundle. There are some more up-to-date receipts in the bundle. The Appellant claims that the receipts show that these were items bought specifically for the children. Some of the receipts go back to 2006 and 2007 showing debits from a bank statement to a supermarket in Slough. I have considered those receipts but I do not find that they assist in establishing whether or not there is any current family life between the Appellant and the children. The position from the evidence was that the parties may have been together at that time. There are some receipts from 2008/2009. Again they are in respect of bank statements showing debits to supermarkets for example Tesco in Slough. It is accompanied by handwritten notes to say that those expenses were for the children. For the reasons I have given earlier, I would not place any weight on the claim made by the Appellant in the handwritten statement that they were for the children. They are simply supermarket receipts for groceries, they do not demonstrate in my judgment and when viewed in isolation that they were for the children or it demonstrates any relationship with the children. Again in 2010 there were bank statements showing debits for Tesco's in Slough and other receipts in 2011 to show from Slough. At page 58 there is one for Tasty Hut Takeaway Food, page 59 August 2011 sweets, Pepsi and groceries. In August 2011 there is a Sheffield receipt for a colour fun pack. None of those by themselves demonstrates that there is a meaningful relationship. There is a bank statement and it is from Mohammed Shabbir who is not even the Appellant (see page 89).

60. As to other newer receipts, one receipt shows a washing machine being purchased from Argos. It is claimed that this washing machine was bought for MF and for the children's benefit. However the delivery note shows that it was delivered to his address in Sheffield and not to that of Slough. As set out in the recitation of the evidence, the reason given for sending it to Sheffield was that he could not have it delivered to Slough. However that explanation does not satisfactorily explain why he could not have obtained the delivery from a store in the Slough area. Further his claim that it was needed quickly is not borne out by the fact that it took him a few weeks for it even to be delivered. Consequently that does not show that it was for the benefit of the family. There are Primark receipts for clothing, cardi, tees, hoodies. Again that does not necessarily mean they are for the children and there is a Suits Sheffield receipt for "extra extra large". There are receipts for sweets and groceries in

Sheffield. The most recent receipts in the bundle are all from Sheffield and none of them have been bought in Slough.

61. My overall view of those receipts are that in general they are non-specific and do not relate specifically to the benefit of the children. They are not all necessarily purchases that are child based and even if I accepted that he has purchased items, that does not in my judgment demonstrate a genuine and subsisting relationship with the children.

62. As regards the telephone bills, he claims that it demonstrates calls made to M. However there is no independent evidence of his wife's mobile number to demonstrate that those calls were made to her mobile. Therefore that evidence does not take the matter any further.

63. The First-tier Tribunal Judge saw a number of photographs. Those photographs are set out at pages 25 onwards. They are replicated in the second bundle of documentation and in the photographs that were collated into an album. None of those photographs have been dated. He claimed at first in his oral evidence that the pictures in the park were taken two to three months ago and confirmed that he was holding a baby. However that baby was born in January 2010 but it was only then that the Appellant confirmed that in fact it could not have been taken two or three months ago but was taken a lot later. There were pictures of his daughter taken in 2007. The photographs themselves are non specific and do not in my judgment demonstrate reliable evidence as to the type of family life or relationship with the children that he claims. Many of the photographs show him with the children at a young age even if it were accepted that some photos show a relationship in 2010, there are none that have been identified cogently as to later than 2010 nor more recently.

64. Photographs themselves cannot show that there is a subsisting and genuine relationship between the Appellant and the children. As to the clips from the DVD, the Appellant claimed first of all that it showed him with the children in 2010, and 2011. He then claimed it showed them in 2012. However on viewing the clips he changed his mind and said that clip 2 showing him playing with one of the children was made in 2009 in Sheffield. As to clip 1 he said it was taken in 2010 in the car showing him driving with him and his partner picking up the children from school. As to clips 3 and 4 he claimed they were taken in March 2011. I do not find that that can be the position as it shows a young baby on the floor and showing a woman with the baby. The youngest child being born in 2010. It is entirely plain from the clips that whilst he could not say they were made on the same occasion, I find that they clearly were. The woman is wearing the same clothes throughout those clips as is the child. The clips also are made against the same background in a bedroom thus I conclude they were all taken on the same occasion.

65. I do not consider that the clips assist the Appellant's case in establishing that he is in a subsisting relationship with his partner or that he is having contact with the children to the degree and nature as claimed. There are no clips from 2012, the

earliest is 2009 and the last he claimed was March 2011 although it is likely that it is earlier. There are no dates on the clips despite them having come from a mobile phone and four clips were taken on the same occasion.

66. Even if I accepted this evidence to show a relationship in the past, it pre-dates the evidence of the wife in 2012 in which she has said that he has no relationship with the children. As Mrs Petterson submitted, it has been accepted that in the past he has had a relationship with the children but the most recent evidence does not demonstrate any support for the Appellant's case that he has current contact with them or the nature and quality of that contact. Importantly none of those clips showed him having any relationship between the children. It did not show the Appellant being close to the children at all and thus is limited evidence.

67. If his claim were true that he was in frequent contact with the children with the consent of the mother, I do not find that it is credible that he would have now taken steps to initiate contact proceedings as set out in the letter from Howells dated 22nd July 2013. His evidence about this application was that he had made it because of the "certain pressures" on the family that if they continue to see him that financial measures would be taken and also the children would be removed from her care. He further claimed in his oral evidence that the social services had been working with the family since March 2011 "when I started proceedings with this case". He was asked several times in cross-examination why the social services were involved but he claimed "I do not know the reasons why". That evidence is wholly inconsistent with the evidence given earlier that he knew about the social services because "my wife tells me everything". If that were true, it is more likely than not that he would have known the reasons for the social services' interest because she as the mother of the children would be entitled to know.

68. Furthermore his evidence was that he claimed to be having contact without the knowledge of the social services and that they had been involved since March 2011. If that were the position it is more likely than not that he would have made an application for contact before July 2013.

69. I find that there has been a considerable delay in any attempt to be involved in contact proceedings. His immigration history demonstrates that if he had genuinely wished to remain in the United Kingdom for the children that he would have submitted an application for leave to remain on this basis before being encountered by the Immigration Officers in March 2011 in a raid, given that the eldest child was born in 2006. The lateness of the submission of such an Article 8 claim to remain in my judgment, severely undermines the credibility of his claim to have a genuine and subsisting relationship with these three children.

70. Despite being in proceedings before the First-tier Tribunal in December 2011, an application for permission to appeal that decision in 2012, a hearing in November 2012 and one in June 2013, there has never been any claim made about social services' involvement and that this is reason why he cannot adduce evidence concerning the relationship with his children and with the mother of those children

whom he claims is under duress from the social services who have threatened to take the children away if she sees Mr Khan. This is despite his oral evidence that the social services had been involved since March 2011. I can only conclude that the reason that this has been raised now is that he has either deliberately not disclosed social services' involvement prior to the hearings despite being involved in immigration proceedings for over two years or there is no such involvement and this is an excuse to support the lack of meaningful and cogent evidence concerning the relationship and contact with his children and to support why he has now made an application for contact demonstrably late.

71. I conclude from the evidence that I cannot accept anything that is said by the Appellant unless firmly supported by cogent verifiable documentation in the light of the circumstances and evidence outlined above.

72. In this context I remind myself of the decision of **RS (Immigration and Family Court Proceedings) India [2012] UKUT 00218 (IAC)**; a decision that makes reference to outstanding family proceedings. That decision makes it clear that in the case of contact proceedings initiated by an Appellant in an immigration appeal, whether there are any reasons to believe that the family proceedings have been instituted to delay or frustrate removal and not to promote the child's welfare. In assessing the above question, judges are asked to consider the degree of the claimant's previous interest and contact with the child, the timing of the contact proceedings, the commitment with which they have progressed such an application, when a decision is likely to be reached and what material (if any) is available to point to where a child's welfare lies.

73. I have therefore applied the decision to the facts of this case and the evidence before me. As I have set out in my findings of fact concerning the evidence, I consider that there are substantial reasons for believing that the family proceedings have been instituted to delay or frustrate removal of this Appellant from the United Kingdom rather than to promote the children's welfare. The evidence before the First-tier Tribunal was that there was no evidence from the mother or from the children concerning the nature of their relationship with the Appellant. There is evidence now. There is a public statement from MF who makes it clear that there is no relationship between herself and the Appellant, that he does not see the children and that they do not wish to see him. In the letter that was purportedly written on 9th September 2011 she has stated that the letter was never written by her and thus the only sensible inference reached from that evidence was that that letter had been a fabrication.

74. I have also found that the reasons given by the Appellant for making the application on 22nd July 2013 are not credible, bearing in mind that these proceedings have been ongoing since 2011, and his conduct does not demonstrate that he is seeking to promote the welfare of the children but that those proceedings have been instituted to delay or frustrate removal. If the Appellant has known since March 2011, according to his claim, that the social services were stating that he could not have contact with the children or with his wife and this is the reason why he has now

made such an application, the date itself demonstrates that he has known this for such a considerable time and that if it were true, he would have made such an application well before July 2013. This case has been before the Tribunal on a number of occasions yet there was never any attempt to make an application for contact until the last possible moment. All of that evidence demonstrates in my judgment that these proceedings have been instituted to delay or frustrate removal. There is evidence before this Tribunal as to where the children's welfare lies. That evidence is from his wife herself is that he does not see the children or that there is any meaningful relationship between them. There is no evidence before the Tribunal that his removal would be likely to cause them serious harm or any detriment. There is no evidence before this Tribunal that he plays any role in their upbringing.

75. The First-tier Tribunal Judge considered the evidence and found the evidence to be "wholly unconvincing" and what was entirely absent was evidence of contact between the Appellant and the children or anything from the children and their mother to say what that relationship was like.

76. The judge noted that there was nothing from the wife concerning that relationship. However before this Tribunal there is evidence from the wife that firstly she did not write the letter dated 9th September 2011 attesting to his relationship with her and the family. Secondly, that she had given a public statement that he did not have a relationship with the children in 2012. For the reasons given I have rejected the Appellant's evidence that such letters were written "under duress" as there is no evidence to support such an allegation. Furthermore for the reasons I have given, the evidence of receipts, telephone calls, etc do not in my judgment demonstrate that the Appellant is maintaining any meaningful relationship with the children or that he has face-to-face contact in a way that is claimed. As the First-tier Judge noted there is "not a single document which evidences any involvement in the children's welfare or education or any evidence of their involvement in their collective life." That is still the position. I find from the evidence before me that it has not been established by the Appellant that he is maintaining a relationship with the children or the mother in the terms that he has claimed. Any historical evidence shows that there was a relationship in 2010 and that there may have been in 2011 but there is no evidence that I can place weight and reliance upon, given the lack of credibility of this Appellant, the fact that a letter had been fabricated and the evidence given by the mother to find that he has given an accurate and reliable representation of his relationship with the children.

77. There is no evidence from any other relative of the children concerning the father's relationship with them or the nature and quality of any time they may spend together. There is no information from the school to show any part that he plays in their welfare or upbringing. The point made by the First-tier Tribunal judge that there was a "dearth of evidence which evidenced any involvement in the child's welfare or education" was entirely right and there has been no evidence provided subsequent to that.

78. Whilst it has been accepted that he is the father of the three children, and that some of the photographs demonstrate him with the children on much earlier dates, they do not demonstrate any current continuing relationship nor do they support the claimed recent visits made, the duration of any visits or give any support for there being any meaningful contact.

79. I now turn to the Appellant's private life and the length of time he claims to have been in the United Kingdom.

80. It is the Appellant's claim that he arrived in January 1998 due to threats to his life in his home country (see statement at paragraph 4). He claimed that in 1998 he applied for asylum through Maher & Co Solicitors and had regular contact with them who said that the "matter was still under consideration with the Home Office". There are some letters provided in the first bundle which I have considered in this regard. There is a letter dated 29th August 2002 (page 19) from Maher & Co. I have considered the documentation provided but I am not satisfied that they are documents upon which I can place reliance and weight. No original documents have been made available and the photocopies produced are of poor quality. For example, the typing is not straight. The letter has a photograph attached to it and there is no reason why such a letter would have a photograph, further the letter is not signed by anyone from the firm. I have also considered the content of the letter. It says this:-

> "To Whom It May Concern
>
> We confirm that we represent the above-named in relation to his immigration matter. We confirm that his matter is pending in the Home Office. It is envisaged that this application will take a considerable period of time to be processed.
>
> We also confirm that the photograph below is a true likeness of the above-named client. If however you require anything further, please do not hesitate to contact us."

81. As I have stated it is not signed by anyone from Maher & Co. There is no indication as to why that letter was ever written or to whom it was sent. It is simply entitled "To Whom It May Concern".

82. At paragraph 5 of his statement he claims to have changed to solicitors to Mahmood Mirza Solicitors in 2008. There is a letter at page 20. This is not a letter to the Home Office but a letter to Mr Khan. Indeed there is no evidence from those solicitors showing any communications with the Home Office, showing any applications made by this Appellant or any reference numbers given by the Home Office in respect of any applications made prior to April 2011. The letter to Mr Khan simply states "In this respect I wish to confirm that we have made representations on your behalf to the Home Office that on 24th September 2008 your application was submitted to the Home Office". Again this letter is of poor quality, it is not signed by any particular named solicitor and furthermore, as outlined above, there is no evidence from Mahmood Mirza showing any communications with the Home Office to support the fact that there were any representations made on his behalf by that firm to the Home Office.

83. The Appellant then stated that he changed solicitors to Zacharia & Co. There is a letter dated 26th May 2010. In that letter it states

> "I write with reference that on behalf of the above. Mr Khan claims that he applied for his visa extension under the Legacy Scheme some time ago. Originally on 29th August 2002 he had a legal representative from Middlesex to deal with his case. …"

I do not find that there is any support from this letter either to demonstrate that the Appellant made any claim for leave or asylum before he made his application in 2011. It refers to Mr Khan applying for "his visa extension under the Legacy Scheme". However he entered the UK illegally and therefore would never have been able to apply for a "visa extension". The letter from Zacharia & Co also sets out only what the solicitor has been told by Mr Khan and it does not appear that they have had any documentation from any earlier solicitors to show that any such applications were made. It is of significance also that the solicitors that he had prior to coming off record, Marks & Marks Solicitors, wrote to Zacharia & Co asking for details from their file but there are no replies from that firm setting out the nature of any enquiries that they had made from the earlier firms of solicitors.

Thus I do not find from that evidence that it gives any support to the Appellant's case that he arrived in 1998. There is no correspondence from 1998 nor is there any evidence of any applications made after that date save for the application made by Marks & Marks Solicitors in April 2011. The earliest letter is from 2002. As to a phone bill at page 122 from 2003 again this is a poor copy but it is in the name of "K. Shrafat–Khan". There is no information to show that he has been known as Mr K Shrafat-Khan and the spelling of "Shrafat" is different from Sharafat. Thus I place no reliance upon this.

84. It is the Appellant's evidence that he first claimed asylum in 1998 (see witness statement paragraph 4). In cross-examination he was asked whether he went to the Home Office or to the solicitors to make such a claim. He claimed that he had gone to the solicitors. This is inconsistent with the original Grounds of Appeal to the First-tier Tribunal (see page 240) the solicitors state that he had claimed asylum on arrival at Gatwick. Thus the Appellant has given inconsistent evidence concerning these circumstance in making a claim for asylum.

85. I also make the following findings from the evidence before me. There is no record of any arrival in the United Kingdom by this Appellant in 1998. I further find for the reasons that I have set out earlier that the Appellant has not discharged the burden on him to show that an application was lodged with UKBA prior to 2011 and there is no reliable evidence from any firm of solicitors to show that such applications were lodged for the reasons that I have given and I attach no weight to the Appellant's evidence that he made a claim for asylum in 1998.

86. It is also right that when he was interviewed, the Appellant could not satisfactorily explain how, if he had arrived in 1998, he had a passport issued to him in Mirpur, Pakistan on 29th March 2002. It was also put to him in the interview that a visa application had been lodged with the Appellant's personal details in August 2000.

87. The Appellant's explanation was that the application was made by a solicitor. However when informed by the Immigration Officer the application was made overseas in Pakistan, the Appellant is recorded as saying he knew nothing about the application for a visa. I do not find that that reflects well upon his credibility or upon his claim that he had arrived in 1998 if that visa application had been made in 2000 overseas in Pakistan using this Appellant's personal details.

88. In oral evidence before this Tribunal, the Appellant claimed in cross-examination in respect of the passport that the solicitors told him that he needed a passport for an application so he got a friend from Pakistan to make the application on his behalf. I reject that explanation. It had not been raised by this Appellant in his interview and I find that if that had been the truth it is more likely than not that he would have given such an explanation when asked about it contemporaneously. I further find that it is not likely that he would have got a friend to obtain a passport for him in Pakistan. The evidence before me is that there was a passport issued to him in Mirpur.

89. Thus it has not been established on the balance of probabilities that he arrived in 1998 and in the light of the unreliability of the evidence produced I do not accept his oral evidence. He has been inconsistent about how he claimed asylum, there is no cogent evidence that he made any application for asylum given the difficulties that I have set out and there was evidence that he was in Pakistan in 2002 applying for a passport. The explanation that he has given is different and not credible. There is a reference from a friend, who did not appear to give oral evidence, he refers to knowing him for ten years so at the earliest he has been in the United Kingdom would be 2003. Despite his claim, he would not have accrued fourteen years as the "clock stopped" in 2011.

90. As to return to Pakistan, I reject any suggestion that the Appellant is in fear of his life and that was the reason that he came to the United Kingdom. If that were the position, I am satisfied that he would have made an application for asylum and would have pursued it. He failed to do so even when invited to do so by the Home Office in 2011.

The Law

Article 8 of the ECHR

91. There is no dispute that I should consider the questions addressed by Lord Bingham in **(Razgar) v SSHD [2004] UKHL 27** at paragraph 17. Those questions are as follows:-

    (i) Will the proposed removal be an interference by a public authority with the exercise of the Appellant's right to respect for his private or (as the case may be) family life?

    (ii) If so, will such interference have consequences of such gravity as potentially to engage the operation of Article 8?

(iii) If so, is its interference in accordance with the law?

(iv) If so, is such interference necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of rights and freedom of others?

(v) If so, is such interference proportionate to the legitimate public end sought to be achieved?

92. In respect of the first question, whether the decision to remove the Appellant from the United Kingdom is an interference with his Article 8 rights in respect for his family life is in issue as it is not accepted by the Respondent that the Appellant has any family life at the present time.

93. Whilst the European Court of Human Rights has established that, from birth, a child has a bond with his or her parents which amounts to "family life" which remains in existence despite voluntary separation (see **Sen v The Netherlands [2007] 36 EHRR 7**, and **Gul v Switzerland 22 EHRR 9**, the question that arises in this case as well as on the facts presented, family life existed within the meaning of Article 8(1). This is a matter of fact to be decided on the evidence presented by the Appellant and the quality of the family life as claimed.

94. As I have set out earlier in this determination the First-tier Tribunal Judge, for sound reasons did not find the evidence demonstrated that he had any family life of the type claimed and gave reasons for that. For the reasons that I have set out earlier in this judgment, I have found that the evidence presented by the Appellant does not change those findings of fact, indeed, there is further evidence from MF herself, which I can only accept, which demonstrates that there is no meaningful relationship between the Appellant and the children presently. Whilst historically, some of the evidence presented by way of photographs show that there was a relationship in 2010 or early 2011, the evidence as at the present time does not show that there is any meaningful relationship. The Appellant has not demonstrated by any reliable and cogent evidence that he has maintained a relationship with the children of the type that he claims. There is no evidence of the duration of the contact visits, where they take place, how the children respond or any wishes and feelings that they may have. The First-tier Tribunal noted the "dearth of evidence relating to the children's welfare and education" and this Appellant's role in their upbringing. That has not been changed by any evidence that has been placed before this Tribunal. Therefore for the reasons that I have set out and the findings of fact earlier in this determination, I am not satisfied on the balance of probabilities that the evidence demonstrates that there is a meaningful and continuing relationship between the Appellant and the children of the type that he claims.

95. Even if I were to accept that there was some limited contact by way of providing items for the children, there is no evidence before the Tribunal as to the quality and nature of any contact or the wishes and feelings of the children. The Tribunal must

consider the best interests of the children. In doing so, in making an assessment of their wishes and feelings concerning the removal of this Appellant, the Tribunal has the evidence from MF in her written public statement of 2012 is that they do not have a good relationship with their father. There is no other evidence to counteract that view independent of the parties. I would find that the best interests of the children require them to remain with their mother and their primary carer. There is no evidence whatsoever of any role that he plays in their upbringing. Thus there is no evidential basis to demonstrate that the Appellant's removal will be likely to cause them any harm or any detriment. There is an absence of evidence concerning the children's welfare despite the length of time that these proceedings have been continuing. I have also found on the evidence in this case that the recent application made for contact has been made in an attempt to delay or frustrate removal for the reasons that I have given.

96. It is accepted that the decision would interfere with his right to respect for his private life. Considering the second issue, it has not been in dispute before me that the refusal decision amounts to an interference with his private life and that it crosses the minimum level of severity to engage Article 8(1). It is common ground between the parties that the decision here was in accordance with the law and it has not been suggested that the Respondent's decision does not further a legitimate aim, namely proper and effective immigration control. Even if I accepted there was family life and the Razgar questions were answered in the affirmative as above, the issue would concern the proportionality of that decision.

97. The correct approach to proportionality is as set out by Lord Bingham in the decision of **Razgar** at paragraph 20:-

> "… [It] involves the striking of a fair balance between the rights of the individual and the interests of the community which is inherent in the whole of the Convention."

98. The assessment is a fact specific exercise and each case must depend on its own specific facts. A judicial decision must be reached by applying an "even-handed application of the proportionality test (**WB (Pakistan) v SSHD [2009] EWCA Civ 215** at (16) per Sedley LJ).

99. In assessing proportionality the Tribunal must have regard to the need to safeguard and promote the welfare of the child who is in the UK (Section 55 of the Borders, Citizenship and Immigration Act 2009).

100. In **EB (Kosovo) [2008] UKHL 41**, at § 12, Lord Bingham, with the assent of the other members of the Appellate Committee, said:

> "Thus the Appellate Immigration Authority must make its own judgment and that judgment will be strongly influenced by the particular facts and circumstances of the particular case. The authority will, of course, take note of factors which have, or have not, weighed with the Strasbourg court. It will, for example, recognise that it will rarely be proportionate to uphold an order for removal of a spouse if there is a close and genuine bond with the other spouse and that spouse cannot reasonably be

> expected to follow the removed spouse to the country of removal, or if the effect of the order is to sever a genuine and subsisting relationship between parent and child. But cases will not ordinarily raise such stark choices, and there is in general no alternative to making a careful and informed evaluation of the facts of the particular case. The search for a hard-edged or bright-line rule to be applied to the generality of cases is incompatible with the difficult evaluative exercise which Article 8 requires."

101. As to the Appellant's private life, the Appellant has failed to discharge the burden of proof upon him to demonstrate that he has lived in the UK since 1998 for the reasons set out earlier. At its highest, the earliest date of his residence would be 2003 and he entered the UK illegally and the ensuing time has been unlawful residence. The First-tier Tribunal accepted, as does this Tribunal that he had established a private life during that time. That is likely to be the position. Whilst I have heard no evidence of any friends it is likely that he would have established friendships and in the light of the letters provided. There are no reasons why those relationships cannot be maintained by letter, telephone calls or visits. There is no evidence before the Tribunal of any employment. There is nothing to demonstrate that the type of private life established in the United Kingdom, whilst of course different to that that he would establish in Pakistan, could not be re-established in Pakistan. He retains his use of the Urdu language, having given his evidence before this Tribunal in that language. He has provided a letter stating that he has skills to obtain employment. There are no reasons why he cannot use those skills in obtaining employment in his country of nationality. He has spent his formative years in Pakistan and can be expected to be able to re-establish links in his home country.

102. Whilst he claims he has no assets having sold them all to enter the UK, he claims to have purchased a house in Sheffield. There is no reason why he cannot sell that property and utilise the proceeds to re-establish himself in Pakistan. As to his immigration history, he is an illegal entrant and there is no evidence to support his claimed entry date of 1998. What is known is that he was encountered at "sizzlers" in 2010 and it was at that time, after his arrest that he made an application to remain on Article 8 grounds. I have found that in his case that he did not take any reasonable opportunity to claim asylum arising out of the circumstances in which he claimed would place him at risk of harm or in fear of his life. Indeed I have found that he has not made any application for asylum even when invited to do so in 2011. Consequently, he has not demonstrated that there is any likelihood that he would be at risk upon return to Pakistan.

103. I now turn to the countervailing factors when considering the overall and wider assessment of proportionality. As an illegal entrant and someone resident in the UK without any form of leave, he has no expectation that he would be able to remain in the UK and he has chosen to establish his family life/ private life in the UK without any valid leave to remain. I pay regard to the well-settled principle that each state has a right to control the entry of non-nationals into its territory (see **Abdulaziz, Cabales and Balandali v UK [1985] 7 EHRR** and that Article 8 does not give the person an automatic right to choose to pursue his or her family or private life in the United Kingdom and the general administrative desirability of applying known

Rules if a system of immigration control is to be workable, predictable, consistent and fair as between one applicant and another.

104. Having considered with care the particular facts of this case I have found that the best interests of the children will be met by them remaining with and being brought up by their mother and primary carer. On the findings of fact made it has not been demonstrated on the evidence that there is any meaningful relationship currently with his wife or children or that he is exercising direct contact to them. Whilst the FTT accepted that he was the father of these children as does this Tribunal, and that he has expressed his love for them, there is no evidence that he plays any role in the care or upbringing of these children. In the light of the evidence before me, in which it has not been established that there is any significant contact with the children, there is no evidential basis that his removal would be likely to cause them any harm or be of any detriment to their welfare. As Ms Petterson submits, it would be open to him to make an application for visits to the UK as the father of settled children and could re-establish or maintain the relationship by way of indirect contact. I have concluded that it would not be unreasonable to expect the private life of the Appellant to be re-established in Pakistan. The countervailing factors as identified by the Respondent and set out above, in my judgment should have significant weight attached to them. I have taken into account the length of residence of the Appellant concerned, and weighed all the factors in the balance. Nonetheless when considering the competing interests in the balancing exercise based on the particular facts of this case, I have reached the conclusion that the decision to remove the Appellant is a proportionate one. Thus the appeal is dismissed under Article 8.

105. It has previously been asserted on behalf of the Appellant that the judge did not consider the factors under paragraph 395C. In the refusal letter dated 14th November 2011 account was taken of all the relevant circumstances before a decision to remove was taken. They are set out at paragraphs 34 onwards. They take into account the Appellant's age, who at that date was 39 and the fact that he had no medical ailments or had any physical infirmity which would make his return to Pakistan unreasonable. His age was not a compelling factor to justify him allowing remaining in the United Kingdom. As to his length of residence it had not been demonstrated that he arrived in 1998 and that he had done nothing to regularise his status until encountered in 2011. Furthermore he had not been given any lawful leave in the United Kingdom. The length of residence is not considered a sufficiently compelling factor to justify allowing him to remain in the UK. As to strength of connections, the ties to the United Kingdom were not considered sufficient compelling to justify allowing him to remain in the United Kingdom. In the light of the findings of fact that I have made that also remains the position. As to his personal history, including character, conduct and employment record, it was considered that he had attempted to evade immigration control by failing to take reasonable steps to regularise his stay. There was nothing in his history, character or conduct sufficiently compelling to justify allowing him to remain in the United Kingdom. He has no criminal history but after compassionate circumstances, there was no compelling compassionate grounds submitted to the Secretary of State, nor before this Tribunal to demonstrate why he should be allowed to remain in the United Kingdom on a compassionate

basis outside the Rules. The representations made were taken into account but they did not raise any factors which justify allowing him to remain in the United Kingdom.

106. I have therefore considered the evidence before me. In determining an appeal against the decision to give directions under Section 10, consideration should be given to whether the decision shows by its terms that the decision-maker took into account the factors set out in paragraph 395C and exercised a discretion on the basis of them. I find the Respondent has given consideration to the factors set out in paragraph 395C in the Notice of Refusal at paragraph 34 and has exercised a discretion on the basis of those factors and for the reasons that are given. As set out, it was not considered that any of those factors identified were sufficiently compelling to justify him remaining in the United Kingdom. Having considered the matters referred to by the Secretary of State in the evidence and in the refusal letter, I am satisfied that the decision took into account those factors and exercised a discretion on the basis of them and the decision was therefore made in accordance with the law.

107. I have considered whether or not the removal of the Appellant would breach his rights under the Refugee Convention or the ECHR. I have reached the conclusion that removal of the Appellant would not breach his rights under either Convention for the reasons given.

108. The third matter I have to consider is whether the discretion under paragraph 395C should be exercised differently. In my judgment, I consider that the factors outlined have been considered properly and in accordance with the law and I adopt the reason given earlier in the determination considering those factors. I do not find that discretion should have been exercised differently and the decision made is in accordance with the law.

Decision

The making of the decision of the First-tier Tribunal involved the making of an error of law. The decision is set aside. The decision is re-made as follows:

The appeal is dismissed.

Signed Date 8/9/13
Upper Tribunal Judge Reeds

APPENDIX 1

IAC-AH-KEW-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/33801/2011

THE IMMIGRATION ACTS

Heard at Bradford
On 19th November 2012

Determination Promulgated

……

Before

UPPER TRIBUNAL JUDGE REEDS

Between

RAJA SHARAFAT KHAN

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Medhurst (Counsel, instructed on behalf of Marks and Marks Solicitors)
For the Respondent: Mrs Petterson (Home Office Presenting Officer)

DECISION AND DIRECTIONS

109. The Appellant is a citizen of Pakistan born on 2nd October 1972. The Appellant appeals with permission against the decision of the First-tier Tribunal (Judge Howard) who dismissed the Appellant's appeal against the decision of the

Respondent made on 14th November 2011 to refuse leave to remain in the United Kingdom based on human rights grounds (Article 8) and to give directions for his removal from the United Kingdom.

110. The history of the appeal is as follows. The Appellant was arrested by the South Yorkshire Police Service on 31st October 2010 on suspicion of assault and false imprisonment. Following this on 1st January 2011, the Appellant was interviewed by immigration officials and claimed that he had arrived in the United Kingdom in 1998 as a result of fearing persecution in his home country. Following the Appellant's subsequent release by the South Yorkshire Police on 2nd January 2011, the Appellant was again encountered by immigration officials following a visit to Sizzlers Takeaway, however, no further action was taken against the Appellant due to his previous arrest on 31st December 2010.

111. On 28th February 2011, a letter was sent to the Appellant by the UK Border Agency for him to attend an interview with immigration officials on 14th March 2011 to discuss his immigration position. He attended on that day and claimed that he had arrived in the UK in January 1998. He further claimed that he had not been working at Sizzlers Restaurant when encountered by the police. He also claimed that he had left Pakistan in fear of his life and had previously submitted an application to the Home Office for asylum. As regards his life in the United Kingdom, he said that he was now estranged from his spouse, MF, whom he claimed that he had married in an Islamic ceremony but that he continued to maintain regular contact with her and the three children.

112. On 4th April 2011, the Appellant's solicitors submitted an application on behalf of the Appellant under Article 8 of the ECHR on the basis of his relationship with his three children living in the United Kingdom. Those children are HS (6th June 2006), S S (25th May 2007) and MS (25th January 2011). It was also stated he could not return to Pakistan as he feared persecution in his home country.

113. On 2nd September 2011, the UK Border Agency requested further information from the Appellant regarding his relationship with the children as no further grounds had been received from his legal representatives. The UK Border Agency also notified his legal representatives that initial claims for international protection in the United Kingdom could not be made by post, but could only be made in person by the Appellant attending the Asylum Screening Unit in Croydon. He was given full instructions on how to lodge such an application. No such application has been made by this Appellant in person in respect of a claim for asylum. Further material was produced by the Appellant via his solicitors on 23rd September 2011 with regard to the application made in April. It was reiterated that the Appellant had established a family life in the United Kingdom with his three children and that to remove him would be a breach of Article 8 of the ECHR.

114. In a notice of immigration decision dated 14th November 2011, the Respondent refused the application made by the Appellant. Those reasons were set out in a decision letter dated 14th November. In summary, the Respondent was not satisfied

that the Appellant had demonstrated that family life existed between himself and his three children or that he had established family life with any other individuals. In particular, the Respondent noted that there was little evidence of claimed contact between the Appellant and his children. In order to maintain contact with them, he would have submitted an application for leave to remain on this basis sooner. His application was made only after he was encountered by immigration officials in January 2011 whilst his eldest child had been born in 2006. Accordingly it was considered that the timing of the submission of such an application after he had been apprehended by the South Yorkshire Police and served with notice of an IS151A in March 2011 undermined the overall credibility of his claims. The Respondent also considered his immigration history and did not accept that there was any record of an application being lodged prior to the submission stated in October 2011. The Respondent considered the Appellant's private life that may have been established in the United Kingdom but after considering all of those matters, the Respondent refused the application.

115. The Appellant exercised his right to appeal and the matter came before the First-tier Tribunal (Judge Howard) sitting in Bradford on 19th December 2011. The judge heard oral evidence from the Appellant only and set out a note of that evidence in précis form at paragraphs 6-8 of the determination. After considering the evidence in this case he reached the conclusion that it had not been established that there was family life in the United Kingdom between the Appellant and the three children nor that he had demonstrated that he had any meaningful or regular contact with those children in the United Kingdom. Furthermore having considered the case in the light of the circumstances set out in paragraph 395C he found nothing to conclude that removal would be unlawful in this Appellant's case.

116. The Appellant applied for permission to appeal that decision and such permission was granted on 30th January 2012 by the First-tier Tribunal (Judge Nicholson). The grant of permission reads as follows:-

> "The Appellant appealed on the grounds that the judge had ignored the law and not made a proper consideration of Article 8 on 'the case facts.'
>
> Although not raised in the Grounds of Appeal, it is arguable that the judge made errors of law in the following respects.
>
> (a) The judge accepted that the Appellant is the father of the three minor children in this county. In those circumstances, it is arguable that the judge made an error of law in asserting that there was no family life as between the Appellant and the children simply because of concerns about contact and in failing to consider the children's best interests. In **Berrehab v The Netherlands [1989] 11 EHRR 322** the European Court said that 'the concept of family life embraces, even when there is no cohabitation, the tie between the parent and his or her child ...'

(b) This finding arguably vitiates the findings under paragraph 395C of the Rules.

4. At paragraph 10 of the determination, the judge arguably erred in law in asserting that the relevant date was the date of decision, albeit that he appears nonetheless to have considered the situation as at the date of hearing.

Although I do not refuse permission on Grounds 2 to 8 they appear to be no more than an attempt to re-argue the evidence."

117. Thus the appeal came before the Upper Tribunal. The Appellant was represented by Mr Medhurst (Counsel instructed on behalf of Marks and Marks Solicitors) and the Respondent by Mrs Petterson (Home Office Presenting Officer). Mr Medhurst had produced a skeleton argument and supplemented this with his oral submissions. He submitted that the First-tier Tribunal (Judge Howard) had made an error of law as identified by Immigration Judge Nicholson in the grant of permission although that had not been submitted in the grounds of the application for permission to appeal. The error in this case was that whilst the judge had found the Appellant is the father of the three children he did not accept that there was any family life and that was contrary to the European case of **Berrehab** (as cited in the grant of permission). Furthermore, the judge erred in law by not considering the children's interests in accordance with Section 55 of the BCIA 2009 and in particular, as emphasised in the decision of the Supreme Court in **ZH (Tanzania) [2011] UKSC 4**, the wishes and feelings of the children had not been ascertained when reaching a decision. In this case it may have involved separate representation of the child or at least an independent investigation.

118. Mr Medhurst also submitted that there had been family life in this case and that he had produced photographic evidence and evidence in the form of bills and receipts and that that was sufficient evidence to demonstrate that there was family life. Whilst the grant of permission made reference to Grounds 2 to 8 as an attempt to re-argue the evidence, it was still the position that the judge was in error by not considering the interests of the children as a primary consideration in reaching the decision in relation to family life and removal. Furthermore, the judge failed to consider the issue of private life in any way whatsoever. The Appellant claimed to have been in the United Kingdom for a period of fourteen years and therefore had established a private life but the judge made no findings or considered that specific aspect of the case at all. The Appellant had provided a statement and letters from friends and also provided information concerning attempts made to make applications to remain in the United Kingdom prior to that of March 2011. Thus it was submitted there was an error of law in the determination of the First-tier Tribunal.

119. Miss Pettersen on behalf of the Respondent submitted that whilst the Judge did not make a reference to Section 55 of the 2009 Act it was clear why he had rejected the Appellant's evidence concerning his claimed contact with the children. It was

significant that the Appellant's evidence was described as being wholly unconvincing which led to the conclusions of the judge in the determination. The judge therefore did have the children's welfare in mind but it was clear that because he had not accepted the Appellant's evidence about the nature of contact that he reached the conclusion that there had not been established on the evidence produced a family life between the children and their father. As regards the private life point raised by Mr Medhurst, the Secretary of State did deal with the issue of the claimed private life in the decision letter and Section 395C considerations. Whilst she accepted that there were various issues raised in respect of the Appellant's private life, it had not been accepted by the Respondent that he had lived in the United Kingdom for fourteen years and the length of residence was disputed. Regardless of when he arrived, in 2011 he would not have met the fourteen years requirement in any event having been apprehended in March of that year. Whilst she conceded that the judge had failed to deal with the issue of private life she submitted that it was not fatal to the determination and that the decision should be upheld. Mr Medhurst by way of reply reiterated that the children's interests had not been considered and that Lady Hale made reference to the fact that they should have their own representation or their thoughts, wishes and feelings should have been ascertained. The Appellant had claimed to be visiting them regularly and produced photographs and travel tickets. In those circumstances he invited the court to find that the First-tier Tribunal had erred in law.

120. I reserved my determination.

121. It is submitted on behalf of the Appellant, relying on the issues raised in the grant of permission rather than as set out in the grounds of permission, that the judge fell into error by accepting that the Appellant was the father of three minor children but that there was no family life due to concerns of contact and not taking into account the children's best interests. Mr Medhurst relies upon the case of **Berrehab v The Netherlands [1989] 11 EHRR 322** where the court stated that "the concept of family life embraces, even when there is no co-habitation, the tie between a parent and his or her child ..." (see skeleton argument page 1 and relied upon in oral submissions). He further submits the judge fell into error by failing to consider Section 55 of the 2009 Act and that the judge failed to follow the guidance given by Lady Hale in **ZH (Tanzania)** (as cited) in ascertaining the wishes of the children which may involve separate representation or at the very least some independent investigation.

122. I have considered those submissions with care. Whilst the European Court of Human Rights has established that, from birth, a child has a bond with his or her parents which amounts to "family life" which remains in existence despite voluntary separation (see **Sen v The Netherlands [2007] 36 EHRR 7**, **(1996) Gul v Switzerland 22 EHRR 9**). However the question which arose in this case before the First-tier Tribunal was whether on the facts of this case family life existed within the meaning of Article 8(1). This is a matter of fact for the judge to decide on the evidence presented by this Appellant. The judge had the opportunity to hear the oral evidence of the Appellant himself and for that to be the subject of cross-examination and to consider that evidence in the context of the documentary evidence also produced.

He gave a short précis of the oral evidence before him at paragraphs 6 – 8 of the determination.

123. There is no dispute that the principles to be applied when considering a claim under Article 8 are those set out in the well-established five-stage test in **R (Razgar) v SSHD [2009] 1AC 1119**. The judge set out those principles at paragraphs 12 to 15 of the determination. He then set out the basis upon which the issue of family life had been advanced on behalf of the Appellant. It is important to set out those factual findings that the judge made at paragraphs 16 to 17 of the determination. The judge said this:-

> "16. The family life advanced here is predicated upon three core facts. The first that he is married to MF. The second that they have three children and the third that they are in regular and meaningful contact with one another. The Appellant and MF met in 2003 and married in 2005. There is no document to support the fact of the marriage and the 'unregistered' nature of the union is cited as a reason why they do not co-habit. The Appellant is named as the father on the birth certificates of the two older children, but not the youngest. Again the 'unregistered' status of the marriage is cited as the explanation. I have evidence in photographic form of the Appellant in company with a woman and three children in a domestic setting and a letter purporting to be written by MF dated 9th September 2011. The only evidence that they are MF and the children comes from the Appellant. Ordinarily that would not be of concern, however given the absence of any input from her or those children in any other aspect of the case causes concern on my part as to those actually in the photographs and who wrote the letter. He has also produced some bills to show purchases by him in the Slough area. What is entirely absent in this case is any evidence of contact between the Appellant and his family. I have nothing from either the mother of the children or the children themselves to say what their relationship with the Appellant is. As for the Appellant his evidence of contact with his family is wholly unconvincing. He lives miles away from them when there is no real bar to his living much closer. There is not a single document which evidences any involvement in the children's welfare or education. Evidence of any involvement in their collective life on the part of the Appellant is absent. In short the Appellant has failed to satisfy me it is more likely than not that he currently has any family life with MF and the three children. The most I can conclude from the evidence is that in the recent past the Appellant has been in a relationship with her that has borne her three children.
>
> 17. It is against this factual background that I must decide whether the decision of the Respondent was proportionate and therefore lawful. I am satisfied the decision of the Respondent does not interfere in the Appellant's family life, as the Appellant has not satisfied me that there is any family life."

124. It had been the Respondent's case (as set out in the decision letter of 14th November 2011) that the evidence produced did not demonstrate that the Appellant maintained a level of contact with the three children as claimed citing concerns regarding the content of a short letter purportedly sent by the mother of the children and that there was no other cogent evidence of contact with the children either from themselves or from relatives of the children/mother. Thus it was not accepted that the evidence demonstrated that he had established close and frequent contact with the children as claimed. The Respondent also relied upon his immigration history citing the point that if he had genuinely wished to remain in the UK for the children then he would have submitted an application for leave to remain on that basis before being encountered by immigration officials in March 2011 (the eldest child having been born in 2006). The submission of the application only after being apprehended by the police undermined the overall credibility of his claimed family life.

125. The judge considered the "three core facts" which were advanced on behalf of the Appellant before the First-tier Tribunal. As to the first fact, that he was married to M F, the judge considered the oral evidence given by the Appellant in which he had claimed that he and his wife did not co-habit because of the "unregistered nature of that union." This is also the explanation given as to why he named on the birth certificate of the eldest two children but not the youngest. The judge found as a fact that there was no documentary evidence to support the Appellant's evidence of there being such a marriage or the "unregistered" nature of the union. However in respect of the second core fact he accepted that the Appellant was the father of the three children concerned. In respect of the third core fact "that the children are in regular and meaningful contact with the father," the judge considered the evidence before the Tribunal. That consisted of the oral evidence of the Appellant, the photographs produced, copy bills/receipts produced and the letter from MF dated 9th September 2011. As regards the cogency of the photographic evidence, he noted that "I have evidence in photographic form of the Appellant in company with a woman and three children in a domestic setting and a letter purporting to be written by MF dated 9th September 2011. The only evidence that they are MF and the children comes from the Appellant. Ordinarily that would not be of concern, however given the absence of any input from her or those children in any other aspect of the case causes concern on my part as to those actually in the photographs and who wrote the letter." He gave consideration to the receipt/bills produced to show purchases in the Slough area. Those bills were in the Appellant's bundle; some were undated (tasting hut). Others related to food bills, a car phone warehouse, receipts from 2011). However the judge found that the most significant feature in his analysis of the evidence was a dearth of evidence concerning contact between the Appellant and the children. As the judge noted;-

> "What is entirely absent in this case is any evidence of contact between the Appellant and his family. I have nothing from either the mother of the children or the children themselves to say what their relationship with the Appellant is. ... There is not a single document which evidences any involvement in the children's welfare or education. Evidence of any involvement in their collective life on the part of the Appellant is absent."

126. The judge went on to find that the evidence of the Appellant himself was "unconvincing" and importantly there was not a single document which evidenced any involvement in the children's welfare or education and that evidence of any involvement on the Appellant's part was absent from their collective life. It was on this basis that the judge, whilst accepting that in the recent past he had been in a relationship with MF and she had borne three children, that was not the current position and that he currently had no family life with MF or those three children.

127. I have considered with care those findings of fact in the light of the evidence that was produced before the First-tier Tribunal. I am satisfied that those findings of fact were made on the basis of all the evidence that was before the First-tier Tribunal and I am equally satisfied that the judge in reaching those conclusions, which were adequately reasoned, were ones that were entirely open to him on the evidence. The grounds submitted on the Appellant's behalf in this respect amount to no more than a disagreement with the conclusions that the judge reached having had the opportunity to hear the oral evidence of the Appellant and against the background of the documentary evidence produced.

128. In considering this appeal I have also borne in mind the decision of **MA (Somalia) [2010] UKSC 49** in which Sir John Dyson SCJ at paragraph 43 reiterated the remarks of Baroness Hale in **AH (Sudan) v SSHD UKHL [2008] 1AC 678** in which she urged caution upon the part of Appellate Tribunals when dealing with decisions of the lower courts. At paragraph 45 Sir John Dyson stated:-

> "The court should not be astute to characterise as an error of law what, in truth, is no more than a disagreement with the AIT's assessment of the facts. Moreover, where a relevant point is not expressly mentioned by the Tribunal, the court will be slow to infer that it has not been taken into account."

129. The judge did not make specific reference to Section 55 of the Borders, Citizenship and Immigration Act 2009. That section came into force on 2nd November 2009 and the decision in **ZH (Tanzania) [2011] UKSC 4** explains the duty imposed by Section 55. In the decision **TS [2010]** the duty under Section 55 is described as thus:-

> "To safeguard and promote the welfare of children who are in the UK. Guidance was issued entitled 'every child matters' stating, 'in accordance with the UN Convention on the rights of the child the best interests of the child will be a primary consideration (although not necessarily the only consideration) when making decisions affecting children."

In the light of the decision of **ZH (Tanzania)** it is more accurate to say that the best interests of the child will always be a primary consideration, but that those interests may be outweighed by other considerations. Lady Hale emphasised "a primary consideration" is not the same thing as the 'paramount consideration' as found within the Children Act 1989." The Respondent in the decision letter of 14th November 2011 had made reference to Section 55 of the 2009 Act at paragraph 33. Whilst the judge did not make specific reference to that section, in the decision of **AJ**

(India) [2011] EWCA Civ 1191 Pil LJ stated that the absence of a reference to Section 55(1) is not fatal to a decision. "What matters is the substance of the attention given to the 'overall wellbeing' (Baroness Hale) of the child."

The primacy of the interests of the child should be considered in the context of the particular family circumstances. Mr Medhurst submits that the judge fell into error by not having in mind the primary interests of the children and in particular that he did not ascertain the wishes and feelings of the children concerned in this case as identified by Baroness Hale in **ZH (Tanzania)**. I have considered the evidence submitted on behalf of the Appellant before the First-tier Tribunal which was his opportunity to put before the judge all the evidence relevant to the application made to remain in the United Kingdom on Article 8 grounds and in particular his claim that he had established family life with his three children with whom he enjoyed a relationship and one of meaningful contact. It is clear in my judgment that the First-tier Tribunal focused upon the interest of the children concerned but reached the conclusion after careful consideration of the evidence produced before the First-tier Tribunal that there was a dearth of evidence relating to the issue of meaningful contact and the relationship between father and children. The Appellant had the opportunity to provide evidence in this application to support his account of his relationship with the children. The time to present that evidence was before the First Tier Tribunal. The judge identified, rightly in my judgment, that he had no evidence from the children themselves or from their primary carer MF to even begin to ascertain the wishes and feelings of the children (I refer to paragraph 16 of the determination). Whilst Mr Medhurst submits that the judge should have ordered separate representation for the children, there was nothing upon which the judge could even base such a process. The burden of proof is on the Appellant to produce the evidence to the Tribunal and the judge clearly identified what he considered to be significant evidence which had not been produced. He specifically identified that absent from the case was evidence of contact between the Appellant and the children and in particular nothing from the children themselves or their mother describing the relationship between themselves and their father. Importantly the judge identified that there was not "a single document which evidences any involvement in the children's welfare or education." Having considered the bundle of documents, there is no evidence from their schools, any evidence from the mother as to the part he plays in their welfare, there is nothing in his statement as regards specific evidence of their welfare. In the light of the dearth of such evidence dealing with the matter that went to the heart of the issue, in my judgment the judge was entitled to reach the finding that he did that whilst he had in the past been in a relationship with MF and three children had been born, he was not currently enjoying a family life with them and that he had not discharged the burden upon him to demonstrate that he had maintained any meaningful or regular contact with those children. In those circumstances I am satisfied that the judge did not err in law in his consideration of the issue of family life under Article 8 of the ECHR.

130. The second point raised relates to the judge's failure to deal with the Appellant's private life. Mr Medhurst submits that despite the Appellant being resident in the UK for fourteen years and having provided evidence before the judge in this regard,

the First-tier Tribunal did not deal with this issue at all. Miss Pettersen submits that whilst there was no reference to this in the determination, the case was really advanced only on the basis of his family life with the children and thus there was no error of law.

131. I have considered those submissions in the light of the determination of the First-tier Tribunal. The decision letter of the Respondent deals with the issue of private life, (as distinct from the family life arguments raised) at paragraphs 30 to 32 of the decision letter. Whilst it is submitted that the Appellant had been in the UK for fourteen years, it is clear that there was a dispute between the parties and the Respondent clearly identified this dispute in the lack of acceptance that the Appellant had been resident in the UK for that period of time citing the lack of evidence relating to this and the fact that in 2002 a passport was issued to this Appellant in Mirpur, Pakistan on 29th March 2002 which was inconsistent with his claim to have entered the UK in January 1998. Furthermore, his immigration history was referred to and that there was no evidence that he had made any application to remain in the UK prior to being apprehended in March 2011.

132. The Appellant had produced letters from solicitors in this respect and also letters from friends concerning the nature of the private life that he had established. However, the determination of the First-tier Tribunal did not deal with any of those issues and there was no reference to the private life of the Appellant whatsoever. The judge did not resolve any issues of fact relating to the length of time that he had been in the UK nor the issue of delay raised on behalf of the Appellant based on the disclosure of albeit limited evidence from legal representatives that he had made an application before that in March 2011. In those circumstances, I am satisfied that the judge made an error by not dealing with the aspect of the Appellant's private life raised by him. Consequently, there will be a resumed hearing in respect of this issue only. For the foregoing reasons, I have set out that I am satisfied that the judge made no error of law in considering the issue of family life for the reasons given and therefore the findings of fact made by the First-tier Tribunal and that part of the decision shall stand. Whilst in the skeleton argument it is submitted that the case should be "remitted for a separate full hearing on the merits," I consider that the decision requires to be re-made dealing with the issue in which the error of law has been demonstrated, namely the issue of the Appellant's private life. Therefore a hearing will take place in accordance with the accompanying directions.

Signed Date

Upper Tribunal Judge Reeds