Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/33474/2014**

THE IMMIGRATION ACTS

Heard at Field House	**Decision and Reasons Promulgated**
On 24 September 2015	**On 9 October 2015**

Before

DEPUTY JUDGE OF THE UPPER TRIBUNAL JUDGE CHANA

Between

MR SIRAJ AHMED KHAN
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms V Laughton of Counsel
For the Respondent: Mr D Clarke, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Pakistan born on 10 August 1984. He appealed against the decision of First-tier Tribunal Judge NMK Lawrence's dated 17 March 2015 from the decision of the respondent dated 7 August 2014 refusing him further leave to remain in the United Kingdom pursuant to Article 8 of the European Convention on Human Rights.

2. Permission to appeal was granted by a Judge of the first-tier Tribunal Shimmin on 18 May 2015, stating that it is arguable that the First-tier Tribunal Judge failed to consider s117B (6) of the Nationality, Immigration and Asylum Act 2002, that the respondent's decision did not interfere with the Article 8 rights of the appellant, his partner and her stepson, rejecting evidence as being self-serving, considering he was not bound by the case of **Chikwamba v SS HD [2008] 1 WLR 1420** and by finding that it was not unduly harsh for the appellant's son to relocate to Pakistan.

First-Tier Tribunal's Findings

3. The First-tier Tribunal's findings were as follows which I summarise. The appellant's relationship with his sponsor is a recent one. They initiated contact in January 2013, met in February 2013 and married in April 2013. This is after the appellant had been trying by all means to remain in the United Kingdom under the Tier 4 scheme and outside the Immigration Rules. The respondent has taken these factors into account and calls the appellant's intentions in forming such a relationship into question.

4. It is asserted that the appellant's sponsor was in an abusive relationship and escaped that relationship and that marriage was dissolved in 2003. It is further asserted that her son did not enjoy a father-son relationship with his biological father which he now enjoys with the appellant. The appellant's sponsor may have been in an abusive relationship in the past but this has no evidential bearing on the appellant's current relationship. The child was born on 20 April 2002 and the divorce took place in 2003. There was not much chance of a father-son relationship developing between them in that short time. The appellant has been involved in the child's life only since February 2013 and the child calls the appellant "dad". The child may call the appellant "dad" as asked, or directed by the adults concerned to achieve a particular purpose. The appellant's witness Mr Abbasi said that the appellant and the child play football together and the child appears happy. It is not unusual for a child, especially a boy, to be happy playing football with an adult.

5. The relationship between the appellant and his sponsor and her son were formed whilst the appellant had no leave to remain in the United Kingdom. The amended sections of the Nationality, Immigration and Asylum Act 2014 and in particular section 117B states that little weight should be given to a relationship formed when the partner is in this country unlawfully. It was also a relationship entered into within a short space of time. Account has also been taken that the appellant's previous attempts to remain in the United Kingdom under the Tier 4 scheme and outside the Immigration Rules. All these factors taken together leads me to find that little weight should be given to these relationships.

6. The best interests of the minor appellant has been taken into account. The child's best interests are a starting point but it is not a determinative factor. In **ZH (Tanzania) [2011] UKSC 4**, the Supreme Court held "any decision which is taken without having regard to the need to safeguard

and promote the welfare of any children involved will not be in accordance with the law.

7. In the instant case, the child in question has lived without the appellant for nearly 11 years. There is nothing put before me that indicates refusal of leave to the appellant will have an adverse impact on safeguarding and promoting the welfare of the child in question. Mere self-serving decisions by the appellant and his sponsor are not sufficient. The written account provided by the child has also been considered and that too is self-serving and perhaps drafted or dictated by the adults to serve their purposes.

8. There are distinctions to be found between the facts of **Chikwamba** and the instant appeal. "Such that I do not find I am bound by **Chikwamba**. I do not find that there are any exceptional circumstances which lead me to go outside the new Article 8 Rules. However in the case of **Aliyu**, the High Court found that there is a duty to assess an appeal under Article 8 of the Human Rights Convention when the new Article 8 Rules are not met.

9. In respect of Article 8, it is considered that if the family life is genuine, the appellant could return to Pakistan and make the necessary entry clearance application from that country. The sponsor and her son could follow or choose to remain in the UK and await the return of the appellant with the correct entry clearance. They have lived without the appellant until April 2013 and have fended for themselves and perhaps before that too. In respect of the fourth question of Razgar, interference with the family life is proportionate. It is a short relationship formed at the time the appellant has been seeking other means of settling in the United Kingdom; it was formed whilst he had no leave to remain in the United Kingdom, there is nothing to indicate that his sponsor and her son will suffer undue hardship either in Pakistan or here awaiting the appellant return with the correct entry clearance.

The Grounds of Appeal

10. The grounds of appeal state the following which I summarise. The first ground of appeal is that the Judge erred by failing to consider s 117B (6) of the NIA 2002. The appellant had an Islamic marriage with the British citizen who has a step son aged 13. There was evidence from various parties concerning the relationship including that of the appellant, his partner and his partner's son. The stepson has provided written evidence and also attended court.

11. A core aspect of the appellant's appeal is that he is in the genuine and subsisting relationship with his stepson who is a qualifying child under section 117D as a British citizen who has spent more than 10 years in the United Kingdom. It will therefore not be reasonable for his stepson to leave the United Kingdom and section 117D (6) states that the public interest does not require the appellant's removal. Despite this being a core issue and despite this aspect of the claim being expressed both in the skeleton argument and oral submissions, the Judge failed to consider or determine

it. The Judge quotes section 117B (1) to (4) of the Act but failed to cover or even refer to section 117D (6) which is a material error of law.

12. The second ground states that the Judge erred by stating that the decision to not an interference with the appellant, his partner of his stepson's Article 8 rights. This is quite an astonishing finding in light of the fact that the appellant will have to leave the United Kingdom, potentially leaving his partner and stepson. This is a clear interference.

13. The appellant's spouse and stepson will have to decide whether to remain in the United Kingdom resulting in an interference with their family life or move to Pakistan which is clearly against the appellant's stepson's best interests which will constitute a clear interference with all their private lives. As held in **AG (Eritrea) [2007] EW CA Civ 801**, the test for engagement is not a particularly high one. Therefore the conclusion of the Judge that there will be no interference is both unreasoned and perverse.

14. The third ground of appeal states that the Judge referred to and seemingly rejected evidence as being self-serving without giving proper reasons. This is a material error of law given that appellant's evidence was provided, both written and oral form from the appellant, his sponsor and the stepson including, Mr Abbasi a family friend. There was also written evidence from the appellant's sister-in-law that the appellant is a much more confident and happy child than he has previously been with the appellant is in his life.

15. All evidence produced in appeals is by its very nature self-serving in the sense that it serves the appellant and that in itself is not a reason enough to reject it. This was held in the case of **Moyo [2002] UK IAT 01104**.

16. The evidence of the appellant stepson is particularly important because the court emphasised in the **ZH (Tanzania)**, the need to consult the children and have evidence of their views. The duty is imposed by s55 to have regard to the statutory guidance promulgated by the Secretary of State. The guidance states that the decision maker must have regard to the views of the child and there is no element of choice or discretion. This guidance was duly published in November 2009 entitled "Every Child Matters Change for Children". At paragraph 2.7 a series of principles are highlighted which are rehearsed in the context of a statement that UKBA must act according to the same. The first is the ethnic identity language faith and gender when working with the child and their family. The second that children should be consulted and the wishes and feelings of children should be taken into account whenever practicable when decision affecting them are made. Children should have their applications dealt with in a timely way which minimises uncertainty. These principles considered in tandem with the principles enunciated by the Supreme Court and the public law duties rehearsed above, envisage a process of deliberation, assessment and final decision of some depth. The antithesis namely something cursory, casual or superficial which plainly is not in accordance with the specified duty imposed by s55 (3) or the overcharging

duty to have regard to the need to safeguard and promote the welfare of any children involved in or affected by the relevant factual matrix. To reject the appellant's son's evidence out of hand based upon nothing more than an evident speculation that it was drafted or dictated by adults, amounts to a further error of law.

17. The fourth ground of appeal is that the First-tier Tribunal Judge erred when he said that he is "not bound" by **Chikwamba**. The Judge by stating that he is not bound by this case is erroneous in law. The first-tier Tribunal Judge may distinguish the case but it is still binding upon him. In any event the case is binding as a point of law, not by an exercise in factual comparisons. The central premise in the case is that as a point of principle and Article 8 claims should not be refused on the basis that it would be more proportionate for the appellant to return and apply for entry clearance. This principle was subsequently confirmed in the case of **Hayat [2012] EW CA Civ 1054**.

The respondent's Rule 24 response

18. The respondent in her Rule 24 response stated the following which I summarise. The Judge was not persuaded by the evidence that the relationship between the appellant and his partner's son fell within section 117B (6) of the 2002 Act. This is clear from paragraph 12 where the Judge concluded that little weight should be given to the relationship relied upon as it was entered into after the appellant's appeal rights were exhausted.

19. In the case of **R (on the application Chen) v Secretary of State for the Home Department IJR [2015] UKUT 189 (IAC)**, it was stated that Appendix FM does not include consideration of the question whether it would be disproportionate to expect an individual to return to his home country to make an entry clearance application to re-join the family members in the United Kingdom. There may be cases in which there are insurmountable obstacles to family life being enjoyed outside the UK and temporary separation to enable an individual to make an application for entry clearance may be disproportionate. In all cases it will be for the individual to place before the Secretary of State evidence that such temporary separation will interfere disproportionately with protected rights. There is no evidence that separation for an application from abroad could lead to a disproportionate interference with protected rights.

The hearing

20. At the hearing I heard submissions from both parties as to whether there is an error of law in the determination of the first-tier Tribunal Judge, the full notes which are in my record of proceedings.

Discussion and findings as to whether there is an error of law

21. It was accepted at the hearing that the appellant could not meet the requirements of the Immigration Rules because he could not meet the

requirements of GEN 1.2 because he and his sponsor had not been cohabiting together for two years to satisfy the definition of "partner" as set out in the Rules. The appellant's claim before the First-tier Tribunal Judge was that refusal of leave to remain in this country will breach his family life with his sponsor and her son and vice versa. Therefore the first issue in the appeal that had to be decided by the Judge was whether the appellant's, his sponsor and his sponsor son have family life which requires protection pursuant to Article 8 and which will be breached by the respondent's decision to exclude him from the United Kingdom.

22. The Judge in his determination made it clear that the appellant had not demonstrated that his relationship with his sponsor and his sponsor's son was genuine. The Judge in his determination at paragraph 11 stated that the appellant's relationship with his sponsor is a recent one. He found that the appellant and his sponsor "initiated" contact in January 2013, met in February 2013 and married in April 2013. The Judge noted that this was after the appellant has been trying unsuccessfully by all means to remain in the United Kingdom under the Tier 4 regime and outside the Immigration Rules. The Judge found that it was only after the appellant became appeals right exhausted and had no further leave to remain in the United Kingdom that he brought his application for leave to remain on the bases of his family life with his sponsor and her son. The Judge was entitled to take this into account, on the evidence before him and made in adverse credibility finding about the appellant.

23. The evidence before the Judge for the genuineness of the appellant's relationship with his sponsor and her son was that the sponsor son calls the appellant "dad". There was also the evidence of the appellant, the sponsor her son and Mr Abbasi that the appellant has a genuine relationship with the sponsor's son. The Judge was entitled to find that this is self-serving evidence taking into account the evidence in the round in light of the appellant's adverse immigration history. The Judge was also entitled to find on the evidence the sponsor's son who is 13 years of age would have done what the appellant and his mother told him to do. The Judge was also entitled to find the sponsor son could have been directed to call the appellant "dad" by the adults in his life. There is no perversity in the Judge's findings that this evidence in itself cannot be relied upon to prove the genuineness of the relationship given the appellants adverse immigration history which goes to the appellant's credibility and to the credibility of his claim.

24. The only independent evidence, (that is to say evidence not from the appellant, the sponsor and the sponsor's son), is from a family friend, Mr Abbasi. His evidence was that the appellant and the sponsor son play football together and are happy. The Judge was entitled to find that it is not unusual for a child, especially a boy to be happy playing football with an adult and that this does not in itself demonstrate that they are in a genuine relationship. I find no material error of law in these findings.

25. Essentially the Judge found that the swift nature of this relationship comes as it does after the appellant has been refused permission to live in this country, was not sufficient for the appellant to demonstrate that he is in the genuine relationship with his sponsor and her son. In fact the Judge found the converse and. At paragraph 11 the judge said that that this calls into question the appellant's intentions in forming this relationship at the time that he did. Implicit in this finding is that the relationship has been contrived in order for the appellant to live in this country having failed in all his attempts to remain in this country under the Tier 4 scheme and outside the Immigration Rules. Furthermore, the relationship was formed at the time that the appellant had no leave to remain in this country and therefore no weight can be placed on his relationship.

26. The Judge having found that the appellant is not in the subsisting relationship with a British citizen sponsor and her son aged 13 in the United Kingdom should have stopped at that point. He need not have considered section 117 especially (6) and Article 8 of the European Convention on Human Rights as these would now be moot in the absence of presence of a genuine relationship. That is where the matter should have ended. If the appellant did not have a family life in this country, there could not be a breach of it for any of the parties involved.

27. I accept that there are errors in the determination such as the Judge saying that he is not bound by **Chikwamba**, and by applying the wrong test which was when he stated that it was not unduly harsh for the appellant's sponsor son to relocate to Pakistan. These errors however are not material errors of law because they do not go to the issue as to whether the appellant's relationship with his sponsor and sponsor's son is genuine which the first hurdle is. If the relationship is not genuine, no further enquiry is necessary.

28. Given that the Judge did not find that the appellant had a family life with his sponsor and his sponsor's son, he was entitled to say that the respondent's decision does not interfere with the Article 8 rights of the appellant, his sponsor and his stepson because they do not enjoy family life in the first place.

29. There is no material error in the determination. I find that the grounds of appeal reveal no more than a disagreement with the Judge's conclusion on the evidence before him. There is no error of law in the determination of the First-tier Tribunal and it stands.

Decision

Appeal Dismissed

Signed by

Mrs S Chana

A Deputy Judge of the Upper Tribunal This 8th day of October 2015