



**Upper Tribunal**

**(Immigration and Asylum Chamber)**

**Appeal number: HU/18454/2019 (V)**

**THE IMMIGRATION ACTS**

**Heard Remotely at Manchester CJC**

**Decision & Reasons Promulgated**

**On 25 June 2021**

**On 6 July 2021**

**Before**

**UPPER TRIBUNAL JUDGE PICKUP**

**Between**

**KAMRAN ASLAM**

**(Anonymity Direction Not Made)**

**Appellant**

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

**Respondent**

**DECISION AND REASONS**

For the appellant: Mr J Gajjar, instructed by MA Consultants (London)

For the Respondent: Ms A Everett, Senior Presenting Officer

This has been a remote hearing which has been consented to by the parties. The form of remote hearing was video by Skype (V). A face-to-face hearing was not held because it was not practicable, and all issues could be determined in a remote

hearing. At the conclusion of the hearing, I reserved my decisions and reasons, which I now give. The order made is described at the end of these reasons.

1. The appellant, a national of Pakistan with date of birth given as 4.4.78, has appealed with permission to the Upper Tribunal against the decision of the First-tier Tribunal promulgated 17.1.20 (Judge Birk), dismissing his appeal against the respondent's decision of 5.11.19 refusing his application made on 30.8.19 for leave to remain in the UK based on family life with his sponsoring wife and stepson, F.
2. In summary, the grounds of application for permission asserted that the First-tier Tribunal's article 8 assessment was flawed in that the judge failed to properly consider EX1 in respect of the appellant's relationship with his stepchild, with whom he claimed a parental relationship. It is argued that the judge gave inadequate reasons for finding that EX1 did not apply, and made an unreasoned and inadequate consideration of s117B(6).
3. Permission to appeal to the Upper Tribunal was granted by the First-tier Tribunal on 14.4.20, on the basis that it was arguable that the First-tier Tribunal Judge materially erred in the article 8 assessment as asserted in the grounds.
4. On 2.7.20, the Upper Tribunal issued directions proposing that the error of law issue should be decided on the papers without a hearing and provided for further written submissions.
5. On 9.7.20, the Upper Tribunal received by email the respondent's brief submissions accepting that the First-tier Tribunal materially erred at [28] of the decision when concluding that the appellant failed to meet Appendix FM after earlier finding at [24] of the same decision that it would be unreasonable to expect F, then 17 years of age and a British citizen, to leave the UK. At [25], the judge found that the appellant met the requirements of EX1 with regard to the parental relationship with the stepson. The respondent accepted that this finding necessarily infects the subsequent article 8 considerations. The respondent invited the Upper Tribunal to set aside the decision of the First-tier Tribunal and relist the matter in the Upper Tribunal with no findings preserved, according the appellant the opportunity to provide updated evidence as to the current circumstances of F, particularly given the stage he was at in his education.
6. The appellant's response to the directions, dated 14.7.20, concurred with the respondent as to the error of law. However, it was submitted that the Upper Tribunal should preserve the First-tier Tribunal's findings at [18] to the effect that it was accepted that the appellant and his wife had been residing together as a couple for over two years and that F has resided with them since returning from Pakistan, is not in contact with his birth father, and "Therefore, family life does exist, and Article 8 is engaged." The appellant also sought preservation of the finding at [21] of the decision that F's evidence was credible and reasonable.

7. In my Rule 34 error of law decision, considered on the papers and without an oral hearing, I concluded that there was an error of law in the judge's finding at [28] of the decision that the appellant failed to meet the Appendix FM requirements, which the judge considered to bear heavily against him in the article 8 proportionality balancing exercise. This appears to contradict the earlier findings in respect of EX1 as a parent.
8. In the circumstances, I concluded that the decision could not stand and must be set aside for error of law. I directed that the decision be remade in the Upper Tribunal.
9. There was and the case remains that there is no objection by either party to my decision being made on the papers under Rule 34 or for the decision to be remade in the light of that earlier decision.
10. The Upper Tribunal has now received: (1) the respondent's skeleton argument, dated 13.10.20; (2) the appellant's undated skeleton argument; (3) the appellant's bundle for the Upper Tribunal, sent under cover of email dated 11.5.21; and (4), the appellant's unsigned and undated witness statement, sent under cover of an email on the day of hearing, 14.5.21. Despite my directions requiring the same, there has been no Rule 15(2A) application and no agreed, consolidated bundle.
11. A previous listing for this continuation hearing of 4.2.21 had to be adjourned because of illness. The next listed date of 14.5.21 also had to be adjourned because, despite my directions requiring one, no Urdu interpreter was provided.
12. I have carefully considered my decision in the light of the submissions and the grounds of application for permission to appeal to the Upper Tribunal.

*Preliminary Issue*

13. Whilst setting aside the decision of the First-tier Tribunal in its entirety, I left open for further submission and argument whether any of the findings of fact from the First-tier Tribunal could or should be preserved. In its skeleton argument, the respondent asserted that the evidence pointed both ways, both in favour of and against the appellant, and suggested it would be illogical to preserve only those findings in the appellant's favour. Unsurprisingly, the appellant sought to persuade me to preserve the findings at [18] and [21] of the First-tier Tribunal decision.
14. After hearing from both representatives, I note that there was a measure of agreement that any findings as to family life in the First-tier Tribunal decision could relate only to the situation prevailing at the date of promulgation of that decision on 17.1.20, following a hearing on 31.12.19. In the premises, neither party objected to my preservation of the clear findings at [18] of the First-tier Tribunal decision that the appellant and his partner had been residing together as a couple for what was then just over 2 years and that Faizaan had resided with

them since his return from Pakistan. Judge Birk found that family life between the three did exist and, therefore, that article 8 ECHR was engaged at that time.

15. Both the appellant and the son of his partner, Mr Faizaan Ahmed (dob 6.6.02), attended the hearing remotely. The appellant's partner did not. The contents of Faizaan's short statement dated 14.10.20 is to the effect that whilst (now 19 years of age) and continuing with his university studies, because of the Covid-19 pandemic he mostly studies online and only attends university about once a week. His intention even after the lockdown is fully lifted is to continue to reside at home and commute to university in Nottingham. As I remarked in the hearing, the contents of this statement are unsurprising. Mr Gajjar also agreed that Faizaan's assertions in the statement that he is dependent on both his mother and the appellant is a subjective believe and it is for me to determine the extent of any dependency, the family circumstances as they are today, and in turn the relevance in the proportionality balancing exercise. Mr Gajjar and Ms Everett both agreed that we could proceed on the basis of Faizaan's statement having been adopted and Ms Everett's concession that there was no point in cross-examination of Faizaan. Mr Gajjar did not intend to call the appellant's partner. It followed that that concluded the evidential aspect for the remaking of the decision and what remained was for legal submissions.
16. Relying on the respondent's skeleton argument, Ms Everett submitted that given that Faizaan had now reached adulthood, the extent of his relationship with the appellant was a 'grey area' in terms of article 8 ECHR. She suggested that although there was evidence of a warm relationship between them, there was not a wealth of evidence to suggest that there was a dependency of Faizaan on the appellant sufficient to engage family life under article 8 ECHR. If the Tribunal concluded that family life was engaged, Mr Everett further submitted that given the circumstances and that the appellant cannot meet the requirements of the Rules, it was not disproportionate to require him to leave the UK and seek entry clearance from Pakistan. The fact that he may not been able to meet the financial requirements of Appendix FM could not render the decision disproportionate.
17. Mr Gajjar relied on the appellant's skeleton argument and submitted further that because of her relationship with her son in the UK, it was not reasonable to expect the appellant's partner to leave the UK for Pakistan with the appellant. It was submitted that given the circumstances of the Covid-19 pandemic little had changed in the family circumstances since the First-tier Tribunal appeal hearing in December 2019. Mr Gajjar also agreed that given the son had now reached 19 years of age, this was a 'grey area' but pointed out that Faizaan did not have contact with his biological father. Reliance was placed on the statement in *Singh & Anor v Secretary of State for the Home Department* [2015] EWCA Civ 630 that, "A child enjoying a family life with his parents does not suddenly cease to have a family life at midnight as he turns 18 years of age. On the other hand, a young

adult living independently of his parents may well not have a family life for the purpose of Article 8." It was submitted but without evidential support that as Pakistan is on the UK government's red list, the appellant would be prevented from returning to the UK even for short visits. Effectively, Mr Gajjar was submitting that there were exceptional circumstances outside the Rules which rendered exclusion of the appellant unjustifiably harsh and, therefore, disproportionate. Mr Gajjar stated that section 55 of the Borders, Citizenship and Immigration Act 2009 and the best interests of a child were not relied on.

18. After considering the evidence and submissions outlined above, I remake the decision in the appeal on the following factual basis:

- a. The appellant came to the UK as a visitor in 2005 and overstayed. He has had no lawful leave to remain since 2005.
- b. He entered into an Islamic form of marriage with his British citizen partner in July 2016 in the full knowledge that he had no leave to remain. They are not validly married under UK law.
- c. The appellant cannot meet the requirements of the Immigration Rules for leave to remain either under paragraph 276ADE or Appendix FM.
- d. There are no insurmountable obstacles to the appellant's family life with his partner continuing outside the UK, should she choose to accompany him.
- e. The appellant and his partner were dishonest in continuing to take the financial benefit discount of single occupancy of their home in Council Tax obligations.
- f. Despite the lies told to the local authority, I accept that the appellant and his partner have continued to live together in a genuine and subsisting relationship, a period found by the First-tier Tribunal in December 2019 to be then more than 2 years.
- g. Faizaan, also a British citizen, has no contact with his biological father and since the age of 14 he has lived in the family home with the appellant and his mother. The appellant has effectively been the only father-figure in his life from that age. They have a warm relationship.
- h. Faizaan is now 19 years of age and will shortly be a second-year undergraduate student at Nottingham University. Primarily because of the restrictions imposed as a result of the Covid-19 pandemic and lockdown, he has continued to live at home, mainly studying online and attending university occasionally. His assertion that he intends to commute to university even after the lockdown is lifted has not been challenged.

*Consideration of the Merits*

19. It is clear, as Ms Everett pointed out, the appellant has pivoted to rely primarily on the relationship with his partner's son Faizaan. Both representatives have described the circumstances in which Faizaan continues to live in the family home even though now aged 19 and at university as a "grey area" as he is no longer a child, yet claiming to be dependent on the appellant.
20. On a consideration of the evidence as a whole, and despite Ms Everett's submission to the contrary, I am satisfied that the appellant does enjoy family life with both his partner and her son Faizaan, at least sufficient to engage article 8 ECHR, applying the Razgar stepped approach, and bearing in mind that the threshold for family life is a low one. There is and has been a family life in a family unit in which Faizaan continues, for the moment, to be a part.
21. However, the key issue is the proportionality balancing exercise between on the one hand the public interest in enforcing immigration control and on the other the right to respect for family life of the appellant, his partner, and her son Faizaan. More particularly, the limited nature and extent of that family must be balanced against the competing interests. In that assessment, it is highly relevant that the appellant cannot meet the requirements of the Rules for leave to remain and that he has unlawfully overstayed his visit visa since 2005. I am satisfied that until he made an asylum claim in 2009, later withdrawn, he attempted to remain under the radar and did not again seek to regularise his immigration status for almost 10 years, until 2019, when he made the application for leave to remain which gives rise to this appeal.
22. I must further take into account the s117B considerations. I am satisfied, as the appellant admitted to the First-tier Tribunal, that both he and his partner knew full well that he did not have lawful immigration status at the time when they entered into a relationship and would be expected to return to Pakistan. The appellant does not speak English and his immigration status has always been precarious and for the most part he has been unlawfully present in the UK. It follows that I can accord but little weight to any private life developed in the UK and the relationship with his partner.
23. With respect to the appellant's relationship with Faizaan, whilst there is family life engaging article 8 ECHR, I have to take account of the reality of the circumstances of that family life. Given that Faizaan is now 19 years of age, no Section 55 of the Borders, Citizenship and Immigration Act 2009 considerations of best interests arise. This is not a case where the Tribunal ought to enquire whether it is reasonable to expect Faizaan to leave the UK and I proceed on the assumption that he will choose to remain in the UK.
24. Faizaan is not the appellant's biological son, but I accept that he has played the role of father to him since approximately the age of 14. I do not undervalue the

warmth of this relationship and the declared attachment between them, but this consideration has to be balanced against the fact that Faizaan is now an adult at 19 years of age, even though continuing to live at home, and will shortly be a second-year undergraduate. Within a short period, he will be looking for post-university career opportunities. I am satisfied that there are no particular features of the relationship between Faizaan and the appellant that can be described as compelling or exceptional. Neither do I accept that the appellant is in any material way dependent or reliant on the appellant beyond what one might expect. He may be attached to both his mother and the appellant in similar ways, but his needs have naturally matured, and he is inevitably in the process of developing his own independence of parental support. There is nothing to indicate that he is particularly vulnerable or for any reason to be considered as particularly dependent on the appellant. The fact that he continues to live at home and that there is family life between them is not a trump card for the appellant. In reality, their situation, even taken at its highest, can be no different to that of many other families with a university student adult child; the family bond continues but the dependency need diminishes.

25. Weighing up all these factors together, in the round, both for and against the appellant, I cannot find any individual or collective factors sufficient to amount to exceptional or compelling circumstances so that the refusal of leave to remain decision would result in unjustifiably harsh consequences so as to render the respondent's decision disproportionate. Whether his mother chooses to remain in the UK or go to Pakistan with the appellant is a matter for her. I am not satisfied that there are any insurmountable obstacles to her doing so, given her knowledge and experience of Pakistan. The fact that the appellant and perhaps also his mother will be physically separated from the adult Faizaan may be sad, but many other young men of his age are naturally leaving the family home to pursue education or careers independent of their family. They will be able to maintain contact through modern means of communication and through occasional visits. It will be for the appellant to demonstrate that he can meet the requirements for entry clearance to return to the UK. This is not a *Chikwamba v SSHD* [2008] UKHL 40 situation where the enforced return would be pointless on the merits.
26. The extent of the bond between the appellant and Faizaan is in my assessment insufficient to outweigh the strong public interest considerations in requiring his removal. In reaching this conclusion, I have taken into account the difficulties highlighted by Mr Gajjar as to Pakistan being on the red list. However, these are but temporary circumstances until the pandemic has retreated. Similarly, the fact that the appellant's partner may not be able to demonstrate an income to meet the financial threshold under Appendix FM does not strengthen the appellant's case or require a shortcut to be provided for him when all others must meet those requirements.

27. In all the circumstances and for the reasons outlined above, I reject the submission that the refusal decision will result in unjustifiably harsh consequences for either the appellant, the sponsor, or Faizaan. I find the decision to refuse his application for leave to remain entirely proportionate to the particular circumstances of this case, balanced against the public interest.

### **Decision**

Having set aside the decision of the First-tier Tribunal for error of law, I remake the decision in the appeal by dismissing it.

I make no order for costs.

Signed: *DMW Pickup*

Upper Tribunal Judge Pickup

Date: 24.6.21