Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/18678/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 14 September 2021	**On 23 September 2021**

Before

UPPER TRIBUNAL JUDGE BLUNDELL

Between

MUHAMMAD AWAIS SHAH
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: No attendance or representation
For the Respondent: Ms Cunha, Senior Presenting Officer

DECISION AND REASONS

1. The appellant is a Pakistani national who was born on 9 April 1982. His appeal against the respondent's refusal of his human rights claim was dismissed by the First-tier Tribunal (Judge Moore) on 25 April 2019. At a hearing which took place on 4 September 2019, the FtT's decision was found by Upper Tribunal Judge Craig to have involved the making of an error on a point of law.

2. Judge Craig held that the FtT had given adequate reasons for finding that the appellant had used a proxy in his English language test. Judge Craig considered the FtT to have fallen into error, however, in that it failed to consider whether the appellant could properly be said to have a genuine and subsisting parental relationship with his teenage step-children. Judge Craig directed that the decision on the appeal would be remade in the Upper Tribunal and that the sole issue would be whether

the appellant had a genuine and subsisting parental relationship with those children, so as potentially to attract the protection of s117B(6) of the Nationality, Immigration and Asylum Act 2002.

3. Judge Craig retired before the resumed hearing was listed. On 18 August 2020, the Principal Resident Judge issued a Transfer Order so that the appeal could be heard by a differently constituted Tribunal.

4. The appeal came promptly before Judge Pickup on 20 October 2020, for a resumed hearing. The appellant appeared in person. The appellant was represented then, as she is now, by Ms Cunha, a Senior Presenting Officer. The appellant applied for an adjournment, stating that he had not been given proper notice of the hearing. Judge Pickup charted the history of delay in the case before agreeing to adjourn on that basis. He expressed disquiet at the appellant's failure to prosecute the appeal efficiently and even raised the possibility of making an order for wasted costs against the appellant personally.

5. There was then a listing before me, remotely, on 9 February 2021. The appellant joined that hearing and he was represented by counsel, Mr Mavrantonis. The hearing was adjourned as a result of technical problems and I issued further directions to the parties in which I wrote this:

> [4] It seems that the shot which Judge Pickup quite properly sounded across the appellant's boughs has gone unheeded. When the matter was called on before me today, the appellant was represented by Mr Mavrantonis of counsel, instructed by Farani Taylor Solicitors. Mr Mavrantonis told me that the appellant had only re-instructed Farani Taylor last Thursday, and that counsel had spent a considerable time providing advice regarding steps which the appellant had failed to take and was not able to undertake in the limited time available. A witness statement had been produced but it remained the case – nearly eighteen months after the decision of the FtT was set aside – that there was no evidence to show that the appellant has a relationship with these two children, let alone a genuine and subsisting parental relationship.
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> [5] Mr Mavrantonis was extremely frank about the situation. He stated that the appellant had moved from one firm of solicitors to another in exactly the way which had previously been noted by Judge Pickup, and that he had even been moving from one solicitor to another within the same firm. He stated candidly that he had told the appellant that the time had come for him to stay with one firm of representatives and to prepare for this appeal.
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> [6] I indicated to Mr Mavrantonis that I would have had no sympathy with the appellant, who seems to me to have failed to heed a perfectly fair and proper warning from another judge of this Tribunal. The fair and just course, in circumstances in which a party fails entirely to co-operate

> with the Tribunal, is to proceed with the appeal on the basis of the evidence adduced. The outcome of the appeal, had I been able to take that course, would have been absolutely clear.
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> [7] Fortunately for the appellant, the hearing by Skype proved not to be viable. Ms Cunha and I experienced extensive and repeated connectivity problems of a kind which I have not previously encountered. However many times the connection was dropped and re-established, it was simply not possible to retain a consistent visual and audio link between all participants. I was left with no option, in the circumstances, but to speak to Mr Mavrantonis and Ms Cunha by telephone so as to manage the future progress of the case, which could obviously not be completed substantively in that way**.**
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> [8] Mr Mavrantonis sought a 28 day period in which to file and serve the evidence upon which the appellant is to rely. Ms Cunha did not object. I indicated that I would accede to that request. **I hereby direct, therefore, that any further evidence upon which the appellant seeks to rely MUST be filed and served within 28 days of today's date.**
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> [9] The appeal will be listed before me for a face to face resumed hearing, no sooner than 16 March 2021. In the event that the appellant does not have representation or fails to file evidence in compliance with the direction above, my intention is that the hearing will proceed.
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> [10] The appellant must understand, as I explained to Mr Mavrantonis, that the obligation to gather and file evidence is his own obligation, and the fact that he wishes to change representatives does not relieve him of that obligation. This appeal has been pending in the Upper Tribunal for nearly eighteen months and the only outstanding issue is one of fact. The appellant must, if he is to succeed, show only that he has a genuine and subsisting relationship with these two children. He does not need solicitors to gather that evidence for him or even to advise upon it, and it is highly unlikely that I will afford him any further time to prove that single point.

6. The appeal was due to return before me remotely on 20 July 2021. At 1258 on 19 July 2021, his then solicitors wrote to the Tribunal to state that the appellant was experiencing Covid-19 symptoms and that he would be unable to attend a hearing physically or remotely. I adjourned the appeal for a third time.

7. It was in these circumstances that the appeal was listed before me again today, for a face-to-face hearing. Notice of hearing was sent to the appellant and to his solicitors (Messrs Farani Taylor) by post and email respectively on 16 August 2021. On 10 September 2021, Farani

Taylor sent a letter to the Tribunal, by email, stating that the appellant had not cooperated with them and had failed to respond to attempts to provide the evidence required for the resumed hearing. In the circumstances, they withdrew their representation.

8. Mr Mavrantonis of counsel also wrote to the Tribunal, on the same date, to explain that he and his solicitors would no longer be acting for the appellant due to his 'non-compliance and non-cooperation'.

9. I stated at the hearing that I was satisfied that the appellant has been given proper notice of the hearing at the address given to the Tribunal for correspondence. There had been no written notification that a different address should be used for correspondence in compliance with rule 13(5) of the Procedure Rules. Notice of the hearing was also provided to the solicitors who were acting for the appellant at that time. I stated at the hearing that I was satisfied that there was no reasonable explanation for the appellant's absence. I considered it to be in accordance with the over-riding objective to proceed with the hearing in the appellant's absence, and I did so.

Submissions

10. Ms Cunha submitted that the appellant had not discharged the burden of proving that he has a genuine and subsisting parental relationship with his two step-children. There were statements from the appellant and his ex-wife but neither had attended to speak to those statements. There were some cards and other such documents but they were of low evidential value. The absence of relevant evidence including photographs of the appellant with the children, was notable. Ms Cunha submitted that the appeal be dismissed.

11. I announced at the end of Ms Cunha's submissions that the appeal would be dismissed and that my reasons for that decision would follow in writing.

Subsequent Events

12. At 1214 on 15 September 2021, I received an email from a member of the Upper Tribunal's staff, forwarding to me an email which the appellant had sent to the general Immigration and Asylum Chamber Customer Service email address (customer.service@justice.gov.uk) at 1655 on 13 September 2021. It was entitled 'Appeal Adjourwithdrawl [sic] request' and stated as follows:

> Dear Sirs,
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> My appeal is scheduled for a hearing on the 14th September 2021. I have received an email at the last minute on last Friday the 10th September, from my lawyer's firm that they are not going to act for me in my appeal scheduled for tomorrow, given their unjustified reasons and leaving me with no time to seek further legal advice and representation. I would therefore humbly request to kindly either adjourn my hearing for a next date or if that is not possible or the judge

> doesn't allow it, I will have no other choice but to request you to withdraw my appeal as I don't have my legal representation at this moment. Please advise whether it is adjourned or withdrawn, so that I can sort my legal representation?
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> I can simply apologise for this last minute change of circumstances as it has been beyond my control and due to very unprofessional behaviour of my previous lawyer.
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> Should you require me of any further information, please feel free to contact me directly.
>
> Kindest regards,
>
> Muhammad Awais Shah

13. It seems that this email was not brought to my attention before the hearing because it was sent to the general IAC email address. It was forwarded from that email address to the address for Upper Tribunal correspondence (fieldhousecorrespondence@justice.gov.uk) at 0942 on 15 September and was conveyed to me reasonably promptly thereafter.

14. I have considered whether to take any action in light of this email. I have considered, specifically, whether to set aside the decision which I announced at the hearing. I have considered whether, had I known of the appellant's email at the hearing, I would have adjourned the appeal or would have consented to it being withdrawn.

15. I would not have taken either of those courses. The history of this appeal speaks for itself. The appellant has failed repeatedly to cooperate with his representatives. He was under no illusions about the need to cooperate with them after the last hearing. I am entirely satisfied that this was underlined to him by Mr Mavrantonis of counsel and, in any event, it was made clear to the appellant in the directions I sent out after the hearing. I do not accept that the appellant has been let down by his solicitors, or that they have displayed 'very unprofessional behaviour'. The reality, as Mr Mavrantonis explained in his courteous letter to the Tribunal, is that it is the appellant who has failed to cooperate, just as he has done on previous occasions.

16. There is a further point. As I explained to the appellant earlier this year, and as I then explained in the final paragraph of the directions I sent to the parties, it is the appellant who bears responsibility for the progression of this case. He is not (and has never been) required to undertake any difficult exercises in evidence-gathering. There need be no expert evidence in a case such as this. All that he needed to establish was that he has a genuine and subsisting relationship with his step-children. The appellant has failed to gather very much evidence of that despite the amount of time that this appeal has been pending before the Upper Tribunal. He has failed to cooperate with the Tribunal just as he has failed to cooperate with his solicitors and it would not

have been in the interests of justice, had I known of his application to adjourn, to accede to that application.

17. It was presumably in anticipation of that outcome that the appellant asked to withdraw his appeal in the event that an adjournment was refused. Had I known of that application, I would not have given my consent to the withdrawal of the appellant's case under rule 17(2) of the Tribunal Procedure (Upper Tribunal) Rules 2008. Given the history of the matter, and given the appellant's lack of cooperation with his solicitors and the Tribunal, the interests of justice militate in favour of there being a concluded judicial decision on the matters in issue.

18. It is for these reasons that I have decided to determine the appeal on its merits and have refused to take any action in response to the alternative requests made in the appellant's email.

Analysis

19. The respondent's decision in this case focussed on the allegation - since accepted by the FtT – that the appellant used a proxy in his English language test. Consideration was also given to the appellant's relationship with his wife and her children, however. The respondent did not accept that there was a genuine and subsisting relationship between the appellant and his wife. In relation to the claimed relationship between the appellant and his step-children, the letter said this:

> Consideration has been given to the fact that your claimed partner Asia Kamaly has 2 British citizen children residing in the UK. However, you have failed to provide any evidence with your application to demonstrate that you have parental responsibility with the children on [sic] that there is an exceptional level of dependency between you and the children. Notwithstanding, if it was accepted you have a parental relationship with the children it is stated in your previous appeal papers IA/26374/2015 that the children reside with their biological father in the week and all of their needs are met by him. The children are thought to see their mother Asia Kamaly only at weekends. You have provided no evidence to suggest the impact of returning to Pakistan in order for you to apply for entry clearance lawfully will have any adverse impact upon the children. There is no reason why contact with the children cannot be maintained from abroad. Many people maintain contact with family and friends from abroad through modern means of communication and visits. You have provided no reason why you cannot be expected to do the same. The children would also have the option to visit you in Pakistan.

20. Before the FtT, the appellant made a witness statement which ran to 8 pages. All that was said about the children was that the refusal of his application was 'going to effect [sic] our life and my wife's children whom I have much attached to.' The remainder of the unindexed and

unpaginated bundle made no reference to the appellant's step-children and there was no evidence of his claimed relationship with them.

21. It seems that this absence of evidence was identified by counsel when the matter came before the FtT, since the file also contains a manuscript statement from the appellant's wife, which was signed on the day of that hearing (11 April 2019). In that statement, she says that her two children live 'with both my ex-husband and myself as we share equal custody of the children'. She states that the children are very attached to the appellant and that he is not allowed to work due to his immigration status, with the result that she is the sole breadwinner. Whilst the judge in the FtT recorded the contents of this statement in his [14], he failed to come to a reasoned conclusion on the question posed by statute, of whether the appellant enjoys a genuine and subsisting parental relationship with the children

22. Additional statements have been made by the appellant during the life of the appeal in the Upper Tribunal. Amongst other things, he stated in those statements that he was 'broken' by the FtT's decision and that he has a strong bond with the children. He goes so far as to state in one of those statements that he is the children's primary carer and that they spend most of their time with him, since his wife works and her ex-husband has them for only 2 or 3 days per week.

23. In one of the more recent statements, the appellant confirms that he and his wife have separated. He claims that the children wanted him to stay at home and to live with them. He claims that he finds it difficult to express in words the feelings he has for the two children, and he gives examples of the activities he has undertaken with them, including going to the park, cooking with them, and playing computer games. He states that the older of the two children is particularly attached to him.

24. There is also a more recent statement from the appellant's ex-wife. She states that her children are 17 and 14 (at today's date) and that they really 'got along with' the appellant. She states that he took them to school and became like a father figure to them. She does not disclose the reasons why the appellant and she separated but she states that a divorce was applied for in July 2020. Her sons were against this, she states, and they remained in contact with the appellant. During the pandemic he had been unable to come to the house but he was 'still performing all his responsibilities' towards the children. He had been in contact with them and had helped them with their homework. When the restrictions had eased, he had been to the house and had spent time with the boys. The appellant's ex-wife says that this made her happy because the appellant's relationship with the children had not come to an end. She states that it would tear the family apart if the appellant were to be removed from the UK and that the children had taken a keen interest in the appellant's immigration case.

25. Appended to the appellant's most recent statements are some birthday cards from the appellant to the children. There is no further evidence of the claimed relationship. There is not a single photograph in the file

of the appellant with the children. Despite the claim that the appellant is in regular contact with the children now that he is no longer living with them, there is no evidence of contact by telephone or other forms of communication (email, Whatsapp etc). There is nothing from the school(s) to show that the appellant has ever played any role in the lives of the children. Given the ages of the children, who are said to be exercised by the ongoing doubt over the appellant's immigration status, it is odd that there are no witness statements from them. There is, in summary, a complete dearth of the evidence I would expect to see in a case of this nature.

26. In respect of the witness statements made by the appellant and his ex-wife, I decline to attach weight to them since they have failed to attend the Tribunal to be cross-examined on those statements and because the assertions therein are wholly unsupported by any other evidence of a genuine and subsisting parental relationship.

27. In the circumstances, I come to the clear conclusion that the appellant has failed to demonstrate that he has any ongoing relationship with his ex-wife's two sons. He does not satisfy the relationship condition in s117B(6) of the 2002 Act and it is unnecessary, in those circumstances, to consider whether the children can reasonably be expected to leave the UK.

Notice of Decision

The decision of the FtT having been set aside, I remake the decision on the appeal by dismissing it on human rights grounds.

No anonymity direction is made.

M.J.Blundell

Judge of the Upper Tribunal
Immigration and Asylum Chamber

21 September 2021