IAC-HW/TH-MP/LW-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/33005/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 26 January 2016	**On 28 January 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE PEART

Between

M A
~~**(ANONYMITY DIRECTION NOT MADE)**~~

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms Short of Counsel
For the Respondent: Mr Duffy, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Pakistan. He was born on 13 June 1969.

2. He appealed against the respondent's decision dated 6 August 2014 to refuse him leave to remain outside the Rules to care for his brother.

3. Judge Birk (the judge) in a decision promulgated on 27 April 2015, dismissed the appeal under the Immigration Rules and on human rights grounds. She found the appellant did not meet the requirements of the Rules and that as regards Article 8, the respondent's decision was proportionate.

4. Judge Lambert considered the grounds and in a decision dated 15 July 2015, found no arguable error of law was disclosed by the application. The grounds were renewed and considered by Upper Tribunal Judge Lindsley who in a decision dated 2 September 2015, found in favour of the appellant with regard to only one of the grounds. It was argued on behalf of the appellant that the best interests of the child of the appellant's brother and his son aged 9 and who the appellant supervised, had not been taken into account because an adjournment request put to the judge at the hearing to be able to provide evidence about the arrangements for the child and contact, was refused. It was submitted that in accordance with **Mwaigwe (Adjournment fairness) [2014] UKUT 418** and **JO (Section 55 duty) Nigeria [2014] UKUT 00517**, an adjournment ought to have been granted in the interests of fairness and proper scrutiny of the best interests of the child.

5. Judge Lindsley found it was arguable that the judge erred in law in not adjourning the appeal in the interests of fairness to enable the mother of the appellant's nephew to give evidence about the appellant's role in the contact between the nephew and his schizophrenic father and his relationship with the child. Further, to provide the Tribunal with information regarding the child's best interests. Judge Lindsley found it was clear that it was accepted by the Tribunal that that arrangement had been going on for eight years and it was appreciated that it might be that the nephew's mother would not allow another person to take over. (See [33] of the decision). That was clearly a major part of the appellant's private/family life relationship and s.55 of the Borders, Citizenship and Immigration Act 2009 required the Tribunal to be properly informed of the position of the child (who would appear to be a British citizen and was at least a long-term resident) and his best interests. It followed that it was arguable that the appeal under Article 8 had not been lawfully determined.

6. The Rule 24 response filed on behalf of the respondent opposed the appeal. The respondent submitted *inter alia* that the judge directed herself appropriately and made reasonable sustainable findings that were properly open to her on the evidence. The judge properly considered the appellant's carer relationship with his brother and his nephew and made reasonable sustainable findings properly open to her that the decision to refuse the appellant's application was a proportionate one in all the circumstances.

7. As regards the appellant's ground that the judge procedurally erred in failing to grant the appellant an adjournment to submit new evidence on the basis that he also cared for his nephew and facilitated contact between his nephew and his schizophrenic brother bearing in mind the best interests of the child, the respondent submitted that the judge's decision to refuse the application was entirely within the range of reasonable responses open to her particularly bearing in mind that

> "… the evidence on this aspect had not been raised previously at all at any stage even though the appellant is legally represented and so it was unclear what precisely the evidence which was going to now be investigated by the

> appellant's representatives was to be produced, save for the possibility of a statement from the mother of the child ... There is no court order for contact which the appellant would be able to adduce." See [4] of the decision.

8. Moreover, the respondent submitted that it was clear from the evidence that was before the judge that the appellant's claimed participation in the contact and care arrangements for his nephew were not a new development. The appellant had ample opportunity to raise that issue before the substantive appeal hearing which he had failed to do. The judge properly considered s.55 with regard to the best interests of the child and made reasonable sustainable findings at [33]–[34] of the decision.

Submissions on Error of Law

9. Ms Short relied upon the grounds which in summary were that there was an issue of fairness regarding the failure to adjourn and following on from that, an inadequate consideration of the best interests of the appellant's nephew.

10. Mr Duffy referred me to [30] of the judge's decision. He submitted that as the judge had accepted the appellant's evidence, no further information was needed. The child was not threatened with removal, such that there were lesser consequences in issue in terms of the child's best interests. There was no reason why other arrangements to facilitate contact between the child and his schizophrenic father could not be put in place; if necessary, an application could have been made in that regard to the Family Court.

Conclusion on Error of Law

11. The judge was asked to consider an adjournment on the day of the hearing so additional evidence could be subsequently put forward regarding the best interests of the child, given it was said that the appellant facilitated contact between the child and his schizophrenic father, the appellant's brother. The judge refused the adjournment because the issue had not been raised previously and because she was unclear precisely what evidence was going to be investigated by the appellant's representatives, save for a statement from the child's mother. The judge determined that the child's mother's evidence was not necessary and that relevant evidence could be adduced through the oral evidence of the appellant and his witnesses, his brother and family friends.

12. The judge knew because she had been told that there were issues the appellant wanted to address with regard to the child's mother's evidence; in particular with regard to the best interests of the child. The judge was clearly faced with an unsatisfactory situation regarding a late application for an adjournment with regard to issues which had been on-going for a considerable time and which should have been addressed earlier. Nevertheless, the judge should have adjourned the hearing because

excluding that evidence was unfair. I bear in mind in that finding, **Mwaigwe** and **JO**.

13. The judge erred firstly by refusing an adjournment and secondly as a result of that failure to adjourn, because the best interests of the child were not able to be adequately considered. To assess the best interests of the child his mother needed to give evidence about the appellant's role in the contact between her son and his schizophrenic father; also, the relationship between the appellant and the child. Given these family arrangements had been ongoing for eight years, the possibility of such a significant change caused by the removal of the appellant from the child's life, needed to have been considered by the judge in terms of the child's best interests. I do accept that the judge attempted such consideration and took into account at [33] that the child's mother might not be happy for another person to facilitate contact but because of the decision to shut out additional evidence, the judge's analysis in that regard was inevitably inadequate.

Decision

14. The decision of the First-tier Tribunal is set aside. The decision will be remade in the First-tier following a *de novo* hearing.

15. Anonymity direction not made.

Signed Date 26 January 2016

Deputy Upper Tribunal Judge Peart