Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/00330/2015**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 13 June 2017	**On 5 July 2017**

Before

UPPER TRIBUNAL JUDGE BLUM

Between

HAFIZ MUHAMMAD NAVEED
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms S Iqbal, Counsel, instructed by Burney Legal Solicitors
For the Respondent: Mr Avery, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal against the decision of Judge of the First-tier Tribunal E.B. Grant (FtJ), promulgated on 26 September 2016, dismissing the Appellant's appeal against the Respondent's decision of 19 May 2015 refusing his human rights claim.

Factual Background

2. The Appellant is a national of Pakistan, date of birth 10 May 1987. He entered the UK on the 23 July 2011 as a student but this leave was curtailed with immediate effect on the 1 December 2013. He made an application on 24

November 2014 for leave to remain on the basis of his private and family life but this application was refused, with no right of appeal, on 17 February 2015. On 18 May 2015 he made a further human rights claim based primarily on his family life relationship with WK, the son of his ex-partner (she was also, at that time, carrying his unborn biological child, T).

3. The Respondent considered a number of documents provided in support of the application. These included child contact agreements between the Appellant and his ex-partner in respect of both WK and the unborn child. Whilst accepting that the Appellant met the suitability requirements under Appendix FM of the immigration rules the Respondent concluded that the Appellant did not satisfy the definition of stepfather contained in the immigration rules as there was no evidence that W.K.'s biological father was deceased and there was no evidence that the Appellant had adopted WK. The Respondent noted that the child contact agreements were not attested or sworn before a public notary and did not consider them binding agreements or a true indication of the Appellant's relationship with W.K. The Respondent did not accept that the evidence provided by the Appellant indicated he had a genuine and subsisting relationship with W.K. or that he intended to undertake an active role in his upbringing. The Respondent then considered the application under paragraph 276ADE of the immigration rules but concluded that there were no very significant obstacles to the Appellant's integration in Pakistan. Finally the Respondent considered whether there were exceptional circumstances that might warrant a grant of leave to remain outside of the immigration rules in accordance with her duties under section 6 of the Human Rights Act and article 8 ECHR. The Respondent relied on her earlier findings that there was no genuine relationship between the Appellant and WK, and that even if there was such a relationship there was no information to demonstrate that the child would suffer any detriment following the Appellant's removal from the UK.

The decision of the First-tier Tribunal

4. The FtJ heard oral evidence from the Appellant which was supplemented by a bundle running to 253 pages. The FtJ considered, *inter alia*, a detailed statement from the Appellant, an affidavit from his ex-partner, and a Common Assessment Framework (CAF) assessment undertaken by the London Borough of Barking and Dagenham in respect of WK (and which also made reference to T, born on 2 June 2015) which was dated 25 April 2016. The FtJ quoted at length from both the Appellant's statement and the CAF assessment.

5. The FtJ concluded that the Appellant could not meet the requirements of the immigration rules in relation to WK because he did not meet the definition of a parent. The judge found, and this was not in dispute, that the Appellant did not have sole responsibility for either WK or T. With reference to E-LTRPT.2.3 of Appendix-FM the judge noted that the Appellant was required to demonstrate he had access rights to the relevant child and that he had to provide evidence

that he was taking and intended to continue to take an active role in the child's upbringing.

6. When considering the CAF assessment the FtJ concentrated on the 'actions required' section and noted the absence of any mention of any role being undertaken by the Appellant either in regard to WK or T. The FtJ emphasised the absence of any role ascribed to the Appellant in relation to either child's development and concluded, given the very concerning Social Services' finding that the children's mother was an inadequate and neglectful parent, that the Appellant was not taking and did not intend to take an active role in the children's upbringing.

7. The FtJ noted a letter from WK's school stating that the Appellant attended meetings and parent evenings and undertook some responsibilities for WK including picking him up from school and engaging with staff regarding WK's academic, social and communication difficulties. The FtJ then stated that there was no credible evidence that when not taking WK to and from school he was with T taking an active role in his son's life.

8. The FtJ considered the "contact agreements" regarding the children but found that these documents were not the result of any order made by the Family Court and, in the absence of the Appellant's ex-partner at the hearing, the FtJ attached little weight to the agreements. The FtJ exclaimed that it was most surprising that the Appellant has not sought to formalise the claimed contact arrangements in the Family Court given the existing social services involvement with his ex-partner and the children and drew an adverse inference as to his credibility from his failure to do so.

9. The FtJ went on to consider the Appellant's oral evidence vis-à-vis the financial documents contained in his bundle. The FtJ drew adverse inferences from the lack of any credible explanation given by the Appellant for various large sums being deposited into his account. The FtJ stated that, despite receiving large sums of cash from unidentified sources in multiple amounts every month the Appellant gave very little to his ex-partner and the children. The FtJ went so far as to suggest that the regular cash deposits were suggestive of money laundering or the proceeds of some criminal enterprise.

10. Having found the Appellant was not credible the FtJ concluded that there was insufficient evidence that he was an active parent who met the requirements of the immigration rules. At paragraph 24 the FtJ stated,

> I have considered whether there are circumstances which merit consideration of the appeal on A8 grounds outside of the immigration rules and I decline to do so. There are no particular circumstances and it can be seen the immigration rules provide a complete code for the A8 assessment within the rules as the parent of a British child.

11. The appeal was dismissed.

The grounds of appeal and submissions of the parties

12. Permission to appeal was sought on several grounds but granted by the Upper Tribunal on only one ground. The Appellant contended that the FtJ refused to accept the contact agreements on the basis that they were not the result of any order made in the Family Court, but this was not a requirement in the immigration rules and was contrary to the Respondent's published policy 'Family Migration: Appendix FM Section 1.0b Family Life (as a Partner or Parent) AND Private Life: 10-Year Routes August 2015'. Given that the Appellant provided a sworn affidavit from his estranged partner it was submitted that the FtJ's failure to accord adequate weight to the contact agreements constituted an error of law. It was additionally submitted that the FtJ failed to sufficiently analyse or accord adequate weight to the CAF report. The Deputy Upper Tribunal Judge granting permission concluded that this ground did disclose arguable errors of law both in relation to the FtJ's analysis of the CAF report and in light of the contents of that report and as to the affidavit from the Appellant's estranged wife in light of the relevant policy.

13. At the hearing Ms Iqbal expanded upon the grounds. She submitted that the FtJ erred in law by failing to give weight to the parent agreements which were duly sworn in the presence of witnesses. The CAF assessment was written with the focus on WK and his mother's ability to be an effective parent. The contact order and the letter from WK's School, in combination with the CAF assessment, accurately reflected the high level of involvement by the Appellant in WK's life. It was submitted that WK's best interests were to have the Appellant present to give him emotional support given the detachment of his mother.

14. Mr Avery submitted that the relevant policy provided guidance but that the degree of the Appellant's involvement with the children was a matter for the FtJ to determine on the particular facts of the case. The CAF assessment looked at the developing relationship between the child and his mother and the FtJ was entitled to conclude that the Appellant was not taking an active role.

15. I indicated at the conclusion of the hearing that I was satisfied the FtJ materially erred in law by failing to adequately engage with the content of the CAF report, by misdirecting herself as to the appropriate legal test for assessing article 8 relationships outside the immigration rules, and for drawing an adverse inference in circumstances where she was not entitled to do so.

Discussion

16. As disclosed in the extensive extracts replicated by the FtJ in her decision the CAF assessment made numerous references to the Appellant's involvement in WK's life. This includes reference to WK securing a positive attachment from the age of 3½ with the Appellant who was "still very much present in his life", WK's "stable and positive relationship" with the Appellant who is described as

a "positive and nurturing caregiver" and who encourages WK's mother to build a relationship with her son, and to the Appellant supporting WK's mother with "the additional parenting and caring role". Despite her extensive replication the FtJ failed to engage adequately or at all with the CAF assessment that the Appellant and WK have "a strong, stable and loving attachment [which] inevitably has had a positive impact on WK's development", and that the Appellant "provides practical, emotional and financial support to the family and engages with school consistently." This constitutes a failure to take account of relevant considerations or to give adequate reasons for rejecting clear evidence of a strong relationship.

17. The FtJ considered that the absence of any mention in the CAF assessment of any role being undertaken by the Appellant either with regard to WK or T undermined his claimed relationship with those children. The CAF assessment however was not prepared for immigration matters, and was not focused on T or his relationship with the Appellant. Nor was it the purpose of the CAF assessment to consider in detail the Appellant's role vis-à-vis WK by reference to the term "active role" contained in the immigration rules.

18. I am additionally concerned that the FtJ concluded, in a non-deportation appeal, that the immigration rules provide a 'complete code' for the assessment of article 8 interests. This is incorrect. The immigration rules have never constituted a complete code within the context of non-deportation related appeals (and it is now clear that they do not constitute a 'complete code' even within the context of deportation appeals, see *Hesham Ali (Iraq) (Appellant) v Secretary of State for the Home Department (Respondent)* [2016] UKSC 60). By concluding that there were "no particular circumstances" outside of the immigration rules that may warrant a grant of leave pursuant to article 8, the FtJ misdirected herself in law and failed to properly consider or engage with the clear and unchallenged evidence in the CAF assessment suggesting that the Appellant did have a relationship with WK.

19. I am additionally satisfied that the FtJ was not entitled to draw an adverse inference from the failure by the Applicant to formalise the contact arrangements with the Family Courts simply because Social Services were involved WK. The Respondent's policy (referred to at [12] above) indicates that there is no need for a residence order or contact order to be provided as evidence of direct access by a person to a child. A letter or sworn affidavit from the UK resident parent care of the child is sufficient. The fact that there was involvement by the Social Services does not require intervention of the Family Courts or the issuance of a residence or contact order, and the decision by the Applicant and his ex-partner to not involve the Family Courts does not rationally reflect on the genuineness of the contact agreements. In these circumstances the FtJ was not lawfully entitled to draw an adverse inference based on the absence of any Court issued orders.

20. Having identified material errors of law both parties were in agreement that the matter would need to be remitted to the First-tier Tribunal for a de novo hearing. Such an approach is particularly appropriate given the further evidence adduced by the Applicant (and not considered by the Upper Tribunal in the 'error of law' hearing') pointing to a reconciliation between him and his ex-partner.

Notice of Decision

The First-tier Tribunal's decision is vitiated by a material error of law

The matter is remitted to the First-tier Tribunal for a fresh hearing before a Judge other than Judge of the First-tier Tribunal E B Grant

I make no anonymity direction.

4 July 2017

Signed Date

Upper Tribunal Judge Blum