Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/06958/2019 (V)

THE IMMIGRATION ACTS

Heard at Field House via Skype for Business	**Decision & Reasons Promulgated**
On Tuesday 20 October 2020	**On 11 November 2020**

Before

UPPER TRIBUNAL JUDGE SMITH

Between

ALI [A]

Appellant

and

ENTRY CLEARANCE OFFICER, SHE/1177278

Respondent

Representation
Ms S Jegarajah, Counsel instructed by IMK Solicitors for the Appellant
Mr T Melvin, Senior Home Office Presenting Officer

DECISION

BACKGROUND

1. By a decision promulgated on 19 August 2020, I found an error of law in the decision of First-tier Tribunal Judge JWH Law. I therefore set aside that decision and gave directions for the re-making of the decision. My error of law decision is annexed hereto for ease of reference.

2. I gave the Appellant the opportunity to file further evidence in support of his appeal. A supplementary bundle was filed on 17 September 2020 and a further letter from the Appellant's stepdaughter was filed on 15 October 2020. I refer to the documents in the supplementary bundle as [ABS/xx]. I also have before me the Appellant's bundle before the First-tier Tribunal which I refer to as [AB/xx].

3. The hearing before me was conducted via Skype for Business. There were no technical issues and the advocates confirmed that they were able to follow the proceedings throughout. Both the Appellant and his spouse, [Z] (hereafter referred to as "the Sponsor") joined the hearing remotely but I did not hear evidence from them as Mr Melvin indicated that he did not wish to cross-examine them.

THE ISSUES AND LEGAL FRAMEWORK

4. As I identified at [3] of my error of law decision, the Sponsor is not settled in the UK. She was granted limited leave to remain on 5 June 2015. The Appellant has now provided evidence as to the basis on which she was granted that leave. The Sponsor confirms that leave was granted to her as the dependent of her parents who were, in turn, granted leave due to the presence in the UK of the Sponsor's minor siblings. As such, both the Sponsor and the Appellant's stepdaughter are Pakistani nationals and neither can provide the necessary relationship and status to fulfil the grant of leave to remain within Appendix FM to the Immigration Rules ("the Rules"). Indeed, the Sponsor's own leave to remain is now due for renewal. She has only recently made an application for further leave to remain which has yet to be considered. It may well be that, in time, the position of the Appellant's stepdaughter will give rise to a separate basis for the grant of leave to remain (as she is now aged over seven years) but that is not the basis upon which leave has been granted at present.

5. The issue therefore is whether the decision to refuse the Appellant entry clearance is disproportionate on the basis that it causes unjustifiably harsh consequences. The following paragraphs of Appendix FM are nonetheless relevant:

> "GEN.3.2.(1) Subject to sub-paragraph (4), where an application for entry clearance or leave to enter or remain made under this Appendix, or an application for leave to remain which has otherwise been considered under this Appendix, does not otherwise meet the requirements of this Appendix or Part 9 of the Rules, the decision-maker must consider whether the circumstances in sub-paragraph (2) apply.
>
> (2) Where sub-paragraph (1) above applies, the decision-maker must consider, on the basis of the information provided by the applicant, whether there are exceptional circumstances which would render refusal of entry clearance, or leave to enter or remain, a breach of Article 8 of the European Convention on Human Rights, because such refusal would result in unjustifiably harsh consequences for the applicant, their partner, a relevant child or another family member whose Article 8 rights it is evident from that information would be affected by a decision to refuse the application.
>
> (3) Where the exceptional circumstances referred to in sub-paragraph (2) above apply, the applicant will be granted entry clearance or leave to enter or remain under, as appropriate, paragraph D-ECP.1.2., D-LTRP.1.2., D-ECC.1.1., D-LTRC.1.1., D-ECPT.1.2., D-LTRPT.1.2., D-ECDR.1.1. or D-ECDR.1.2.

(4) ….

GEN.3.3.(1) In considering an application for entry clearance or leave to enter or remain where paragraph GEN.3.1. or GEN.3.2. applies, the decision-maker must take into account, as a primary consideration, the best interests of any relevant child.

(2) In paragraphs GEN.3.1. and GEN.3.2., and this paragraph, "relevant child" means a person who:

(a) is under the age of 18 years at the date of the application; and

(b) it is evident from the information provided by the applicant would be affected by a decision to refuse the application."

6. As I indicated in the course of the hearing, the central dispute in this case is whether family life between the Appellant, Sponsor and her child can be expected to be continued in Pakistan (permanently or via visits as now) or whether there are obstacles such that it cannot be. Against that, dealing with the Respondent's case, the issue is whether the public interest requires that entry clearance be refused and if so the extent of that public interest. Outside the Rules (which is the only basis on which the Appellant can succeed), the issue is whether the interference with family life gives rise to unjustifiably harsh consequences (see Agyarko and Ikuga v Secretary of State for the Home Department [2017] UKSC 11 – "Agyarko" - at [19])

7. I will come on in due course to the reasons why it is said that family life cannot be continued in Pakistan. In terms of the legal position, I accept Mr Melvin's submission that the State has the right to control the entry of non-nationals even where family life has been established. That position dates back to at least the cases of Abdulaziz, Cabales and Balkandali v UK (application no 9214/80). However, as those cases also recognise, the State may have, in appropriate circumstances, the positive obligation to permit entry to allow family life to be continued. As the law has since developed, the essential question when considering whether that positive obligation arises is whether there are "insurmountable obstacles" to family life being pursued outside the UK (see, for example, Agyarko at [42] of the judgment – although that was a removals case, the same principles apply by analogy).

8. In terms of the public interest in refusing entry clearance, although, as Ms Jegarajah submitted, the Appellant and Sponsor have followed the legal procedures for seeking entry clearance and have not sought to circumvent the Rules, there is, as Mr Melvin submitted, a public interest in refusing entry where the Rules are not met. In this case, the Rules are not and cannot be met due to the Sponsor's status. She has only limited leave to remain and not indefinite leave to remain. I accept, as Mr Melvin submitted, that to hold that an individual with limited leave should be allowed to sponsor the application for entry of a partner in every case, would drive a coach and horses through the Rules. Indeed, Ms Jegarajah recognised as much. The issue is whether the circumstances of this case are sufficiently exceptional to permit that course. Mr Melvin very helpfully indicated that the Respondent did not rely on any other aspect of the public interest. No issue is taken regarding the financial circumstances of the couple or in relation to Mr [A]'s ability to speak English for example.

9. I recognise however that the Sponsor's lack of settled status is not insignificant. It is a particular difficulty in this case because, as I observed at [4] above, she has recently made an application for further leave. Although that was an in-time application and therefore her leave continues under Section 3C Immigration Act 1971 until it is decided, as Mr Melvin pointed out, the Respondent has not yet examined that application nor decided that the Sponsor's leave and that of her daughter should be continued.

10. Leading on from that observation, the other crucial aspect of this case, not least as to the obstacles to family life continuing in Pakistan, is the position of the Sponsor's child. The Respondent did not and does not accept that there is a genuine and subsisting parental relationship between the Appellant and his stepchild or that family life exists between the two. That is an issue which I must determine. However, irrespective of that issue, there is a child affected by my decision and I need to take into account that child's best interests.

11. Section 55 Borders, Citizenship and Immigration Act 2009 ("Section 55") provides that "[t]he Secretary of State must make arrangements for ensuring that (a) the functions mentioned in subsection (2) are discharged having regard to the need to safeguard and promote the welfare of children who are in the United Kingdom". Those functions include those which relate to immigration.

12. Those obligations are reflected in statutory guidance published by the Home Office entitled "Every Child Matters" (dated November 2009). Ms Jegarajah drew my attention in particular to [1.4] which reads as follows:

> "Safeguarding and promoting the welfare of children is defined in the guidance to section 11 of the 2004 Act…and in *Working Together to Safeguard Children* as:
>
> - Protecting children from maltreatment;
> - Preventing impairment of children's health or development (where health means 'physical or mental health' and development means 'physical, intellectual, emotional, social or behavioural development');
> - Ensuring that children are growing up in circumstances consistent with the provision of safe and effective care; and
> - Undertaking that role so as to enable those children to have optimum life chances and to enter adulthood successfully."

13. The best interests of the child are a primary although not the primary or paramount consideration. The importance of those interests is neatly encapsulated at [44] in the case of ZH (Tanzania) v Secretary of State for the Home Department [2011] UKSC 4 in the speech of Lord Hope:

> "There is an obvious tension between the need to maintain a proper and efficient system of immigration control and the principle that, where children are involved, the best interests of the children must be a primary consideration. The proper approach, as was explained in *Wan v Minister for Immigration and Multicultural Affairs* [2001] FCA 568, para 32, is, having taken this as the starting point, to assess whether their best interests are outweighed by the strength of any

> other considerations. The fact that the mother's immigration status was precarious when they were conceived may lead to a suspicion that the parents saw this as a way of strengthening her case for being allowed to remain here. But considerations of that kind cannot be held against the children in this assessment. It would be wrong in principle to devalue what was in their best interests by something for which they could in no way be held to be responsible."

14. The Appellant's stepdaughter is now aged nearly eight years. She has lived in the UK for over seven years. I enquired of Mr Melvin whether I could or needed to take into account when considering the public interest in refusal of entry clearance that the child is now or may be a qualifying one for the purposes of Section 117B Nationality, Immigration and Asylum Act 2002 ("Section 117B"). Section 117B (6) reads as follows:

> "In the case of a person who is not liable to deportation, the public interest does not require the person's removal where-
>
> (a) The person has a genuine and subsisting parental relationship with a qualifying child, and
>
> (b) It would not be reasonable to expect the child to leave the United Kingdom"

A qualifying child is defined at section 117D(1) as "a person who is under the age of 18 and who – (a) is a British citizen, or (b) has lived in the United Kingdom for a continuous period of seven years or more…"

15. In response to my question concerning the application of Section 117B(6) to this case, Mr Melvin drew my attention to the case of SD (British citizen children – entry clearance) Sri Lanka [2020] UKUT 43 (IAC) ("SD") at [47] and [48] as follows:

> "**Statutory provisions and Section 117B(6)**
>
> 47. Section 117A-D of the 2002 Act only apply where a *court or tribunal* is considering human rights claims (s117A(1)). Section 117B(6) provides protection for persons in a genuine and subsisting relationship with a qualifying child who is defined in s. 117D(1) to mean a British citizen child or a child who has lived in the UK for a continuous period of seven years or more. From this it is clear that for British citizen children who fall within the geographical scope of s.117B(6) (see next paragraph) there is no residential requirement; they are qualifying children merely by virtue of their nationality (however, even the person who has a subsisting parental relationship with a qualifying child cannot succeed under s.117B(6) unless also able to show that 'it would not be reasonable to expect the child to leave the United Kingdom'; the child's British citizenship is not enough on its own).
>
> 48. We consider both parties correct to view s.117B(6) as having no application in entry clearance cases, since geographical scope is integral to its wording. That its sole concern is with persons *in* the UK is clear from its reference to a '*removal*' from the UK of persons in a parental relationship with a child and from its reference, as regards the relevant child, to whether '(b) it would not be reasonable to expect the child to *leave the UK* (emphasis added). For that reason we think Mr Lewis goes too far in asking us to regard the underlying policy of Parliament expressed in this subparagraph as being to give substantial weight to the possession of British citizenship irrespective of geographical location. There is

> no equivalent to s.117B(6) in any provision relating to entry clearance applicants. We cannot assume that is unintentional. That said, as we shall come back to, we consider it consistent with Home Office policy to treat a child's possession of British nationality as a relevant consideration."

16. Whilst I accept that Section 117B (6) cannot apply directly because it is concerned with removal of those in genuine and subsisting parental relationship with a qualifying child, the case of SD is not directly on point either. In that case, the children concerned (who were British nationals) were also outside the jurisdiction (living in Sri Lanka). The guidance given in the headnote that "[t]here is no equivalent to s.117B(6) …in any provision of law or policy relating to entry clearance applicants" has to be read in that context. The children on whose position reliance was placed in that case were themselves not living in the UK. Although Section 55 is applied to their situation via the lens of Gen 3.3 of Appendix FM, as a domestic legal provision applying to children living in the UK, it does not apply directly whereas in this case, Section 55 does apply to the Sponsor's daughter. It is somewhat difficult to see why, if the Appellant in this case is found to be in a genuine and subsisting parental relationship with a child who is found to meet the definition of a qualifying child (depending on the reasonableness question), the public interest does not favour him being entitled to enter if it would not require his removal even if he were in the UK illegally.

17. As I understand the Respondent's position as regards the relationship between the Appellant and the Sponsor and her daughter, she accepts that the relationship is genuine and subsisting with both but she does not accept that the relationship between the Appellant and his stepdaughter is a parental one. I have regard to what is said in SR (subsisting parental relationship – s117B(6)) Pakistan [2018] UKUT 334 (IAC) that "[t]he determination of [whether there is a genuine and subsisting parental relationship] turns on the particular facts of the case". That was expanded upon by the Tribunal at [35] as follows:

> "35. The assessment of whether there is a 'genuine and subsisting parental relationship' for the purposes of EX.1 and section 117B(6)(a) is different in form and substance to whether a parent has taken an 'active role' in the child's 'upbringing' for the purposes of R-LTRPT1.1. It is possible to have a genuine and subsisting parental relationship with a child, particularly in cases where contact has only recently resumed on a limited basis, but for that relationship not to include the parent playing an active role in the child's upbringing. The fact that SR has not been involved in making important decisions in A's life does not necessarily mean that he has not developed a genuine and subsisting parental relationship. The nature and extent of that relationship requires a consideration of all the factors referred to in RK at [42]. The child's age is also likely to be a relevant factor."

Paragraph [42] of RK (R (oao RK) v Secretary of State for the Home Department (s117B (6); "parental relationship") IJR [2016] UKUT 31 (IAC) there referred to reads as follows:

> "42. Whether a person is in a 'parental relationship' with a child must, necessarily, depend on the individual circumstances. Those circumstances

> will include what role they actually play in caring for and making decisions in relation to the child. That is likely to be a most significant factor. However, it will also include whether that relationship arises because of their legal obligations as a parent or in lieu of a parent under a court order or other legal obligation. I accept that it is not necessary for an individual to have 'parental responsibility' in law for there to exist a ' parental relationship', although whether or not that is the case will be a relevant factor. What is important is that the individual can establish that they have taken on the role that a 'parent' usually plays in the life of their child."

18. There is also an issue whether the relationship which the Appellant has with the Sponsor and her daughter constitutes family life. Whether or not that is the position, those relationships are clearly part of their private lives and it is equally clear that the refusal of entry clearance interferes with the lives of the Appellant, the Sponsor and her daughter as they are prevented from forming and continuing their relationship on a face to face basis within the UK.

19. The issue thereafter is whether it is proportionate to continue to refuse entry clearance on the basis that the Sponsor and her daughter can be expected to continue their relationship with the Appellant in Pakistan. I will come on in due course to the reasons why it is said that they cannot.

20. Even if they cannot, I need to assess whether it is proportionate to expect the Appellant, the Sponsor and her daughter to maintain their relationship as they do now at distance until such time as the Sponsor and/or her daughter are in a position to sponsor the Appellant's entry within the Rules (in practice until the Sponsor is given indefinite leave to remain or her daughter is given leave in her own right and if it is accepted that the Appellant enjoys a parental relationship with her). The assessment of proportionality requires a balance between the level of interference and the public interest said to justify the refusal.

EVIDENCE

21. As I have already noted, Mr Melvin did not seek to cross-examine either the Appellant or the Sponsor and their written evidence therefore stands unchallenged.

22. I begin with the evidence as to the position between the Sponsor and her former partner who is the father of her child. In response to a question which I asked during the hearing, the Sponsor confirmed that, so far as she is aware, her former partner continues to live in the UK. It appears that he has formed another relationship. She does not know his immigration status. When she was in a relationship with him, he had no lawful immigration status. She also confirmed that they were never married legally in the UK. They underwent a religious marriage only. As such, there is no formal divorce document.

23. One of the main reasons why the Sponsor says that she and her daughter cannot go to live in Pakistan with the Appellant is because she is prevented from taking her daughter outside the jurisdiction of England and Wales without the consent of her daughter's father. That emerges from the Family Court documents at [AB/56-62]

which the Sponsor and the Appellant were permitted to adduce in evidence previously by the Family Court.

24. Although it was previously indicated that further documents might assist the Appellant's case and therefore that the protocol between this Tribunal and the Family Court ought to be invoked, I rejected that submission in my error of law decision. There appeared to me to be ample evidence in the orders already disclosed. In particular, a non-molestation order was made in the Sponsor's favour against her former partner indicating that there had been some form of domestic violence or other reason why it was considered appropriate to prevent her former partner having access to her.

25. I was told that allegations have also been made against the Sponsor's former partner in relation to his treatment of the Sponsor's child, but I have no evidence of that (other than from the Sponsor). However, the evidence shows that, although the final order made by the Family Court in 2016 anticipated direct contact between the child and her biological father, that has not continued and the contact between them is now extremely limited. The contact now is set out in the letter from the child's school at [ABS/32] and is limited to "letters and cards that he sends to the school". That development since the Family Court's final order suggests that there has been a deterioration in the situation and the level of contact which the Court was initially prepared to permit and a recognition that direct contact is no longer appropriate.

26. Although there is no indication of ongoing or intended direct contact between the Sponsor's child and that child's biological father, the Family Court did make an order preventing either the Sponsor or her former partner from removing the child from the jurisdiction of England and Wales "without the other parent's written agreement in advance or an order of the court".

27. I do not accept however that this order alone is a sufficient impediment to constitute an "insurmountable obstacle" to family life between the Sponsor and the Appellant continuing in Pakistan for the following reasons.

28. First, the order was made at the instigation of the Sponsor herself. I will come on to reasons why she may have made the application to prevent the child's biological father from taking the child out of the UK. However, although it is said in the Sponsor's first witness statement that the child's father refused his consent to take the child to Pakistan in 2016, the Sponsor was able to obtain a court order allowing her to do so ([16] of the statement at [AB/12]).

29. Second, there is no indication that the child's father has opposed subsequent travel by the child outside the UK when the Sponsor and child have visited the Appellant in Pakistan. The Sponsor's evidence is that the child's father has remarried and appears to have no interest in contact with his child beyond the indirect contact presently maintained. The Sponsor says in her first statement that the child's father sends her letters and cards "every three months" and that "every six months" the Sponsor sends him "a report on her general welfare, wellbeing, likes and dislikes" ([24] of the statement at [AB/14]). The formality of that arrangement suggests to me

that it is a court approved arrangement, but I do not have the evidence of that as (rightly) there has been no further disclosure of documents from the Family Court.

30. Third, there is no evidence that the Sponsor has applied to have the order discharged. The Family Court in 2016 was concerned with the separation of husband and wife and arrangements to be made as between them for custody of and contact with their child. It was not concerned with the immigration position. If an application was made to discharge the order, the Court would be made aware, not only that the biological father now has only indirect contact and that the Appellant (the child's stepfather) lives in Pakistan but also that none of the Sponsor, the child or the child's father has the right indefinitely to remain in the UK and that all are Pakistani nationals. The Sponsor cannot insist on the operation of a court order in the UK as evidence of her being unable to take her child to live abroad when she has made no attempt to have that order varied or discharged some four years later.

31. As I have already indicated, however, there appear to have been reasons why the Sponsor sought the order she did preventing the father from taking the child out of the UK. Those appear in her initial witness statement at [AB/10-17] as follows:

> "12. In October 2015, my parents took me to Pakistan with them for a month, as they knew I was suffering with depression and thought I could do with a holiday. Unfortunately, Mohammed found out about our trip on social media.
>
> 13. Whilst we were in Pakistan, Mohammed sent people to threaten me and my family, through his family and contacts there. He sent men to my uncle's shop and they made threats and asked my uncle for his home address so they could find us.
>
> 14. Following this incident, I had to stay with extended family and could not visit my uncle until he had moved to a new house. Mohammed then made threats to take [B] away from me and 'sort me out'."

32. Although, as Mr Melvin pointed out, the Sponsor has taken the child to Pakistan since, apparently without incident, Ms Jegarajah pointed out that it would be by no means unusual for the father of a child (or his family) to seek to remove a child from the mother in Pakistan and the law is likely to be on the father's side in that regard.

33. That such problems might continue to exist is evident from the Sponsor's second witness statement, where she says this ([ABS/6]):

> "4. Although I have been awarded residence, I do not have sole parental responsibility. I am prevented in taking my daughter out of the UK for more than 5 weeks at a time.
>
> 5. There is currently an additional problem because the Pakistani authorities will not renew my daughter's passport because I am not 'divorced' from her father/ do not have his authority. I cannot file for a new court order to address this issue at this time due to delays due to Covid, which means that I have no way of travelling to Pakistan with my daughter to see my husband, even on holiday, for the foreseeable future."

34. Even on her own evidence, however, that problem is not insurmountable. There may be a delay due to the pandemic and any wrangles between the parents which might delay resolution of the issue. However, on the evidence presently, the Family Court

orders, and objections of the child's biological father are not an insurmountable reason why the Sponsor and child could not go to live in Pakistan with the Appellant.

35. That though is not the end of the matter. This case involves a child living in the UK. As I have already pointed out, Section 55 applies to her and I have to assess what is in her best interests.

36. The Sponsor's child, [B] was born in the UK on 22 November 2012. [B] was granted leave to remain in line with her mother, initially, on 25 June 2015 ([AB/21]). That leave was extended from 27 April 2018 to 1 November 2020 ([AB/20] and [AB/53]) and an application to extend it further is currently under consideration.

37. The breakdown of the Sponsor's religious marriage to her former partner is described in her first statement at [AB/11]. Following an incident of domestic violence, the Sponsor separated from the child's father in 2013 and although she reconciled with him at their families' behest in 2014, the relationship ended permanently in March 2015. [B] has therefore not lived with her biological father after the age of two years.

38. Although, supervised contact was permitted followed by overnight contact by the Family Court order, the Sponsor says in her statement at [AB/12] that she reported her former partner for abuse following [B]'s behaviour after the visits. The contact after October 2017 is said to have been indirect only as I have already noted. At that time, [B] would have been just under five years old.

39. The Sponsor met the Appellant in 2016. He came into [B]'s life in January 2017 when the Sponsor allowed her to have contact with him remotely. [B] met the Appellant for the first time when the Sponsor married him in July 2018. She has therefore known the Appellant for about two to three years.

40. Dealing first with the evidence of [B]'s relationship with the Appellant, the Sponsor says the following about it in her second witness statement ([ABS/6]):

> "7. It is expensive to visit and such visits would have to be timed over the holidays to make it possible for my daughter. I stated to [B] that I might have to travel there without her next year but she was very, very upset at the thought and states that she misses him too.
>
> 8. Ali is the father she never had. During the holidays, they would talk on the phone for about an hour a day, he tells her stories, something I am not good at. He plays games with her on messenger and we use snapchat to help them send funny character photos to one and other. She sends him cards on Father's Day and he dotes on her, is never angry with her and always makes time for her. They have a special bond and she wants to share her certificates and awards with him; he is proud of her.
>
> 9. With the return to school, she still speaks to him for half an hour most days in the week. In total, we spend at least two hours on the phone with each other every day as a family. We use messenger and WhatsApp and send each other messages and photos frequently.

> 10. He can't visit us as the Home Office will not grant a visitor visa as they will question his intention to leave. Similarly, we need visas for everywhere else we go and it is expensive to stay in hotels.
>
> 11. If Ali was here, he would be able to help by either taking care of [B] or allow me to reduce my hours and care for her. [B] wants me (or Ali) to be able to pick her up from school and gets upset when her friends have both parents collecting. When she sees her friends with siblings, she gets upset and always asks when we can have a brother for her. She always express her feelings that she is alone and she needs a sibling to play with and it's not fair that her Papa Ali can't join us. We would initially live with my parents if he joined us but would intend to save up and move out as quickly as we were able into local rented accommodation near my work and [B]'s school."

41. The relationship is further described in the Appellant's witness statement as follows ([ABS/2-3]):

> "1. [B] had bad experiences with her biological father, but she calls me Papa and I love her just as if she were my own daughter. We have continued to keep in touch by calls and messenger during this period and this particularly important for her whilst she was off school. We have spent a lot longer on the phone to each other during this period and she often sends me pictures and animations.
>
> 2. [B] has told me of all the plans she has for when I finally join her and Huma in the UK. Her dream is for us all to go to Disneyland together, and she wants me to drop her off at school in the mornings. It is heart breaking to see [B] sad, I want to do everything I can to join and her care for her [sic] and make Huma happy.
>
> 3. [B] wanted me to be with her on her birthday, which is 22 November which I missed and I would like nothing more than to be there with her this year. I send gifts through family and she sends thanks and posts messages on social media.
>
> 4. It has [been] impossible for us to enjoy a family life together. Seeing each other once a year and having to maintain contact over messages and video chats is hard for all of us, especially due to the Covid pandemic…"

42. There is evidence in the bundles in support of what is said in the statements about the regular contact between the Appellant and the Sponsor/ [B] by electronic means.

43. The relationship is also described by [B]'s grandfather in a letter at [AB/28] as follows:

> "We see [B] is very happy with Ali (stepfather) and there [sic] bonding is very good. She talk to him over video chats and try to show him every moment of her life as she miss him."

44. The Sponsor's brother, Zaman, has also described the relationship between the Appellant and [B] in his letter at [AB/32] as follows:

> "I have been in communication with her husband since their marriage and I am happy with the way their relationship is going, especially in regards to [Z]'s daughter [B]. Being [B]'s uncle, it was clear how much she was affected by not having a present father as she would see and hear about all the other children's fathers. I can see the change in [B]'s happiness too since [Z]'s marriage with Ali [A] but there has been the

> barrier of distance between them. [B] still does not get to experience the father daughter relationship to its fullest extent due to them being apart."

45. The Sponsor's brother, Ali, says the following in his letter at [AB/38]:

> "I am the youngest brother of [Z] Shah and my name is Ali Shah. I have been trying to assist my sister in any way possible for being there when she needs, especially when it comes to my niece [B]. Myself and my other family members have been trying to fill the fatherly role for my niece but it is difficult as I will always be her uncle first. I therefore think that Ali [A] has done a tremendous job and has built a great relationship with [B] which is clearly visible to me through observing the two communicating. It has been difficult for [B] since the separation from [Z]'s ex but not due to her missing the actual person but due to the void which was created by the separation. I therefore could clearly see the change in the happiness of [B] once that void was filled by Ali [A] but even at the moment you can tell she clearly misses the physical company of a father due to them being apart."

46. Letters from other family members in the Appellant's initial bundle are to like effect and provide strong support for the evidence given by the Sponsor and the Appellant about the Appellant's relationship with [B]. I also have a copy of a letter from [B] to the Appellant where she says this:

> "To pappa
>
> I wish you were here. I love you so dearly and I wish you were here. Just imagine. Things would be so much more easier. I miss you lots and lots and I still remember all the fun things we did like 1 year ago but I'm still praying for the passport and to still remind you that I am 7 years old. How old are you? And I hope you see this letter from me and I love you so so so much bye!"

She has drawn a picture of herself and the Appellant at the bottom of the letter.

47. That [B] clearly wishes to have the Appellant in her life does not mean that she could not go to Pakistan with her mother to live with him there. In terms of where her best interests lie in terms of country of residence, the Sponsor's statement points out that her family (the child's grandparents) are in the UK as are other relatives. The Sponsor and [B] live with them. The Sponsor says in her first statement that "[her] whole support network, [her] education and career, [her] daughter's school, [B's] grandparents and all the life [B] has ever known and that [the Sponsor has] known as an adult, has been in the UK". There is confirmation that [B] attends primary school and has a very good attendance record.

DISCUSSION AND CONCLUSIONS

48. As I noted at [4] above, and is accepted on his behalf, the Appellant can only succeed based on Article 8 outside the Rules. That is not to say that the Rules are entirely irrelevant, particularly since Appendix FM recognises that there may be exceptional circumstances where removal or in this case refusal of entry clearance would result in unjustifiably harsh consequences.

49. As I note at [7] above, the question when considering whether interference with family life occasioned by removal (or, in this case, refusal of entry clearance) is

justified involves consideration whether there are "insurmountable obstacles" to family life continuing in the Appellant's home country, which is also the country of nationality of the Sponsor and her child.

50. If this case had involved only the Appellant and the Sponsor, I would have had no hesitation in finding that refusal of entry clearance was proportionate. I accept that, as husband and wife, even though they do not live together, their relationship constitutes family life and that the refusal of entry clearance interferes to a substantial extent with that family life. They continue that family life at present only by infrequent visits. However, on the evidence, if the only consideration was the family life between the Appellant and the Sponsor, that interference could be dealt with by them living together in Pakistan. There would be no insurmountable obstacles to them doing so.

51. However, at the heart of this case is the position of a seven-year old child born and brought up in the UK. I therefore begin with her best interests. Those are a primary although not the paramount consideration.

52. I accept that I have limited evidence of [B]'s best interests. However, it stands to reason that her best interests, indeed the only option for her continued welfare, are to stay with her mother.

53. I have set out at some length above the evidence which I have about the Appellant's relationship with [B]. I accept that [B] has only had the Appellant in her life for two to three years. She has never lived with him and has only visited on a handful of occasions. That position though is as a result of the physical separation which is forced on the family by the immigration position.

54. On the evidence, I have no doubt that the relationship between the Appellant and [B] is strong and that both view it as a father/daughter relationship. [B] only has very limited indirect contact with her biological father and, on the evidence, neither party has any wish to strengthen that bond. On the other hand, [B] calls the Appellant "papa"and he plays the part in her life which would usually be fulfilled by a natural father, albeit that he can do so only remotely due to the physical circumstances. He reads her bedtime stories, she tells him of her achievements, and sends him cards on Fathers' day.

55. I accept that there is no evidence that the Appellant makes decisions about [B]'s upbringing. That is unsurprising in circumstances where he is not her natural father, and where she lives with her mother and at a physical distance from her stepfather. However, in terms of the care which the Appellant provides, albeit remotely, I consider the relationship to be one which could be termed "parental".

56. Of course, it is not necessary for me to reach a conclusion whether the Appellant is in a parental relationship with [B] as I accept that Section 117B (6) cannot apply directly in this case. However, again, the approach of that section is instructive to where the public interest lies as I explain at [16] above.

57. The evidence shows that the continuing of the relationship between the Appellant and [B] as it is now via infrequent visits is having a detrimental effect on [B]. The Sponsor speaks of [B] being upset by the fact that she does not have two parents as do her friends. That evidence is confirmed by the statement of one of [B]'s uncles. The Appellant mentions that [B] looks forward to him being able to take her to and collect her from school if he is allowed to come to the UK. [B] is an only child, and the Sponsor says has expressed a wish to have a brother or sister. That is something which could not easily happen if the family relationship continues as it does now. [B] is aged nearly eight years. As Ms Jegarajah pointed out, if the Appellant and Sponsor had to wait to form a permanent family life in the UK until the Sponsor has indefinite leave, [B] would be aged thirteen years. Those are important, formative years for a child and [B]'s appreciation of the difference between her position and that of her friends is only likely to increase over that time.

58. On the evidence as set out above, I accept that the relationship between the Appellant and [B] amounts to family life. The Appellant is [B]'s father figure. She treats him as such. He recognises her as his daughter. Their relationship as it currently stands is not in [B]'s best interests. The Appellant's absence from [B]'s life on a permanent basis is having a detrimental impact on her and that is likely to increase. For that reason, I find that it is in [B]'s best interests to live also with the Appellant.

59. The next issue is whether [B] could be expected to go to live in Pakistan with the Appellant and the Sponsor.

60. I have already indicated that I am unpersuaded that the Family Court order prevents [B] being taken to live in Pakistan. It may be that, if an application were made to discharge it, that application would fail and in those circumstances there would be evidence that it does prevent [B] going to live in Pakistan but I have no evidence that the Sponsor has tried to take that course. There is no evidence that [B]'s natural father is interested in pursuing more direct contact with [B] and it may be that, now he is in another relationship, he would not obstruct the Sponsor if she wished to take [B] to live in Pakistan which is, after all, her (and his) country of nationality.

61. Whilst I accept the Sponsor's unchallenged evidence about what occurred with her former partner's family when she visited Pakistan in 2015, I am unpersuaded that this amounts to a reason why the Sponsor and [B] could not go to live in Pakistan. As I say, there is no evidence that [B]'s biological father has any desire to increase his contact with [B] or have much to do with her at all. Whilst it may well be the case that the paternal family would, in Pakistan, have the law on their side if they sought to take [B] away from her mother, there is no evidence that they have tried to take such action and [B] has been taken to Pakistan on at least two occasions without such incident.

62. It does appear that there may be a current difficulty with the obtaining of a passport for [B] without her biological father's consent. I am prepared to accept that the Pakistani authorities do require that in order to issue a new passport. However, I do not have evidence about possible ways around that difficulty and even the Sponsor's

own evidence indicates that it may be overcome by court intervention if necessary. There must be some latitude in the procedure. Absent any firm evidence from the Pakistani authorities that they are unwilling or unable to issue [B] with a new passport, I do not accept that the difficulty is an insurmountable obstacle.

63. The question is then one whether [B]'s best interests are served by remaining in the UK or going to live in Pakistan. I accept that, on the evidence, [B] has not expressed any objection to travelling to Pakistan. Indeed, she appears to welcome visits to her home country. However, the reason for that attitude is no doubt because the visits allow her to see her stepfather. There is also a big difference between a visit for a few weeks to a month and going to live in a different country.

64. I recognise that, at her age, [B] is likely to be adaptable. She is doing well in school in the UK but there is no evidence that she would not also do well in education in Pakistan. She speaks Urdu albeit, it is said, to a limited extent. I note however that her grandmother (the Sponsor's mother) with whom [B] also lives needed an Urdu interpreter if she was to give evidence in the First-tier Tribunal and therefore that is undoubtedly a language which is spoken at home.

65. Ultimately, though, I have reached the conclusion that it is in [B]'s best interests to remain in the UK. She has all her family (aside the Appellant) here. That is an important and unusual factor in this case which is highlighted by the Respondent's own actions as regards the Sponsor and [B]. As I have set out at [4] and [36] above, the Sponsor and [B] were given limited leave to remain in June 2015. Mr Melvin confirmed in his submissions that the Sponsor was given leave based on her family life with her family members. That leave was given on a discretionary basis outside the Rules. Although the Sponsor had by then returned to the family home following the breakdown of her marriage to her former partner, she was an adult. Her leave was premised on her relationship with her family whose leave was itself dependent on the entitlement to leave of her younger siblings. Although the Sponsor had by that date formed her own family unit (albeit one which had broken down) and had a child of her own, she was nonetheless recognised by the Respondent as part of the family unit of her parents and siblings to a sufficient extent that the Respondent accepted that it would be disproportionate to remove her and [B] to Pakistan. At the time, [B] was aged only two years.

66. Moreover, the Respondent was persuaded, in 2018, to renew that leave. I do not know if the Respondent was told about the Sponsor's relationship with the Appellant at that time. I suspect not. She did not marry him until July 2018, after further leave was granted. However, by granting further leave, the Respondent recognised that the Sponsor and [B] remained a part of the family unit in the UK to such an extent that it would be disproportionate to remove them to Pakistan. [B] was then aged five years. She is now aged nearly eight years. If anything, her bond with her family in the UK and her private life here will only have developed further.

67. I cannot pre-judge what will be the outcome of the application for further leave to remain which is currently before the Respondent. The Sponsor's marriage to the Appellant may be thought to have changed her circumstances. However, on the

other side of the coin, as I have already noted, [B] may now be a "qualifying child" for the purposes of Section 117B(6) and may be able to succeed in an application for leave to remain within the Rules under paragraph 276ADE due to her age. That will depend on the view taken as to reasonableness of her going to live in Pakistan. My decision is not of course concerned with an appeal against a decision to remove the Sponsor and [B] and I therefore do not intend to speculate as to the outcome of the pending application.

68. However, I do consider material to the best interests assessment the fact that the Respondent has recognised that the Sponsor and [B] should not be removed from the UK in the past due to the strength of their private and family life ties here. They have been given leave to remain outside the Rules but on a route which it is intended will lead to settlement. The strength of the ties between the Sponsor and [B] on the one hand and their family members on the other is, in this case, such that [B]'s best interests are served by remaining in the UK as part of that family unit.

69. I turn then to consider the factors on the other side of the balance, namely the public interest.

70. The sole factor weighing against the Appellant in the public interest is the maintenance of effective immigration control. Mr Melvin confirmed that to be the position. That is an important factor. That the Appellant is unable to satisfy the Rules is something which has to be given weight. As I have already remarked at [8] and [9] above, the reason why he cannot do so due to the Sponsor's lack of settled status is not insignificant. I have also accepted Mr Melvin's submission that to allow a spouse of a person with limited leave only to enter the UK in every case would drive a coach and horses through the Rules which contain a requirement for a sponsoring partner to be British or settled (or to have refugee leave).

71. As Ms Jegarajah pointed out, effective immigration control also requires those seeking to enter or remain to follow proper procedures and not to seek to circumvent the Rules. This is not a case where the Appellant has entered illegally or has overstayed leave and seeks to remain when he has no right to do so. The Appellant and the Sponsor have been married now for over two years and they met and began their relationship over four years ago. They have waited patiently for the Appellant to be permitted to join the Sponsor in the UK lawfully. However, it is to be expected that those seeking to come to and remain in the UK ought to follow the correct procedures and that is not a factor which weighs in their favour. It is neutral.

72. The Section 117B factors have limited application in an entry clearance case. This is not a case where I am bound to give little or limited weight to private and family life due to any unlawful or precarious immigration status. The Appellant is accepted to speak English and it is now accepted that the Sponsor meets the financial requirements (see [2] of my error of law decision). Both factors are however neutral.

73. Ultimately, as I noted at the outset, the outcome of this appeal comes down to a balance between the obstacles to family life being continued in Pakistan or as it is now via family visits and the public interest.

74. I have accepted that both the Sponsor and [B] enjoy family life with the Appellant. The refusal of entry clearance interferes to a sufficient extent with that family life to require justification. The justification in this case is a legitimate one due to the Appellant's inability to meet the Rules. The outcome therefore involves a balanced assessment between the level of the interference and the public interest and a determination of which of those factors outweighs the other.

75. I accept that what [B]'s best interests require is not determinative of the balance. Those interests are however a powerful consideration. I have explained the impact of the Appellant's absence on [B] and I have reached the conclusion that her best interests are served by living with both the Sponsor and the Appellant and continuing to live in the UK. The issue is whether those interests are outweighed by the public interest.

76. In this case, the public interest lies in the Appellant's inability to meet the Rules. He cannot do so because the Sponsor only has limited leave. However, the Respondent has recognised now on two occasions that it would be disproportionate to remove the Sponsor and [B] from the UK due to the strength of their ties and membership of the family unit of the Sponsor's parents and siblings in the UK. The situation has changed in a technical sense due to the Sponsor's marriage to the Appellant but she and [B] remain living in that family unit. [B]'s own position has undoubtedly strengthened as she has got older and is in the process of forming her own life in the UK. Whilst a failure to meet the Rules is in general an important factor in favour of refusal of an application for entry clearance, in this case, the strength of that factor is reduced by the weight which the Respondent has herself given to that consideration in the past when considering whether to give the Sponsor and [B] the right to remain.

77. Balancing the impact of the refusal of entry clearance on the family lives of the Appellant, the Sponsor and particularly [B] against the public interest and giving appropriate weight to [B]'s best interests, I am persuaded that the refusal has unjustifiably harsh consequences and the refusal is therefore disproportionate.

DECISION

The Appellant's appeal is allowed. The Respondent's decision is unlawful under section 6 Human Rights Act 1998 (Article 8 ECHR).

Signed: *L K Smith* Dated: 5 November 2020
Upper Tribunal Judge Smith

APPENDIX: ERROR OF LAW DECISION

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/06958/2019 (P)

THE IMMIGRATION ACTS

Decided under Rule 34 without a hearing
On Monday 27 July 2020

Before

UPPER TRIBUNAL JUDGE SMITH

Between

ALI [A]

Appellant

and

ENTRY CLEARANCE OFFICER, SHE/1177278

Respondent

DECISION AND DIRECTIONS

BACKGROUND

1. The Appellant is a national of Pakistan. He appeals against the decision of First-tier Tribunal Judge JWH Law promulgated on 11 December 2019 ("the Decision"). By the Decision, the Judge dismissed the Appellant's appeal against the Respondent's decision dated 3 July 2019 refusing his human rights claim made in the context of an application for entry clearance to settle with his wife ("the Sponsor"). The Respondent refused the application because the Sponsor is not settled in the UK and because her income was just below the minimum threshold of £18,600. The Sponsor is also a national of Pakistan. She has lived in the UK since December 2006. She has limited leave to remain in the UK.

2. The Sponsor's income had risen to over the minimum threshold by the date of the hearing before Judge Law. That was therefore no longer an issue. However, the application still fails under the Immigration Rules ("the Rules") due to the Sponsor's non-settled status. The issue for Judge Law was therefore, whether, assessing the human rights claim outside the Rules, the Respondent's decision led to unjustifiably harsh consequences for the Appellant and the Sponsor. The Sponsor also has a child of another relationship and therefore an issue arose whether the consequences for that child would also be unjustifiably harsh. The child is the subject of a Family Court order (disclosed with the permission of that Court) which prevents the Sponsor removing the child from the UK without the consent of her birth father. The Sponsor has visited the Appellant in Pakistan with her child. The focus of the child's interests therefore includes also her relationship with both her stepfather and biological father.

3. The Judge found that the Appellant's application could not meet the Rules, both due to the Sponsor's status but also because she could not demonstrate sufficient income for the requisite period. Outside the Rules, the Judge accepted that the Appellant has a family life with the Sponsor but not with the Sponsor's child ([19] and [20] of the Decision). He accepted that interference with the Appellant's and Sponsor's family life was of sufficient gravity to require justification. He concluded however that refusal of entry clearance was not disproportionate. In relation to the child, the evidence before the Judge was that the child had been taken by her mother to visit the Appellant in Pakistan on one occasion in 2017 without the permission of the child's biological father. The Sponsor said that this was because the child's father had previously refused to grant permission. However, the Judge also noted the evidence that the only contact between the child and her biological father since October 2017 had been via letters and cards every three months ([27]). Balancing the interference with the family life which had existed for several years at long distance against the public interest, the Judge concluded that refusal of entry clearance was proportionate.

4. The Appellant appeals on four grounds as follows:

   Ground one: the Judge has erred in fact when asserting that the Respondent had not been informed of the existence of the child when the application for entry clearance was made. Reference is made to the child not having physical contact with her father as such contact has been prevented by Social Services because of allegations of sexual abuse of his daughter. It is said therefore that the Respondent would also have been aware of the particular vulnerability of the child.

   Ground two: the Judge has failed to consider the best interests of the child. It is said that this was not considered because of the error of fact identified in ground one.

   Ground three: (wrongly numbered as second ground two): the Judge has failed to consider the Respondent's "positive obligation … to develop family life". The basis of the Judge's conclusions as to family life between the Appellant and the Sponsor's child (that none exists) is based on lack of emotional dependency. The grounds point

out that such could not be established as the child has never lived with the Appellant.

Ground four (wrongly numbered as ground three): the Judge acted irrationally in concluding that it was not disproportionate to refuse entry clearance because family life could be maintained as now until such time as the Sponsor obtains indefinite leave to remain. It is said that it would be six years before she could be entitled to such leave (although the grounds do not state when that period began).

5. Permission to appeal was granted by First-tier Tribunal Judge Foudy on 23 April 2020 in the following terms so far as relevant:

> "… 2. The grounds argue that the Judge failed to consider GEN.3.3.(2)(b) of the Immigration Rules and the best interests of a child and failed to properly assess the Appellant's Article 8 claim.
>
> 3. In the decision the Judge made reasonable findings on many of the issues however it appears that he excluded consideration of the child as he believed that the Respondent was not told of the child's existence in the application.
>
> 4. The grounds disclose arguable errors of law."

6. By a Note and Directions dated 14 May 2020, having reviewed the file, I reached the provisional view that it would be appropriate to determine without a hearing (pursuant to Rule 34 of the Tribunal Procedure (Upper Tribunal) Rules 2008 – "the Procedure Rules") the following questions:

(a) whether the making of the First-tier Tribunal's decision involved the making of an error of law and, if so

(b) whether that decision should be set aside.

Directions were given for the parties to make submissions in writing on the appropriateness of that course and further submissions in relation to the error of law. The reasons for the Note and Directions was the "present need to take precautions against the spread of Covid-19, and the overriding objective expressed in the Procedure Rules".

7. The Appellant filed submissions in response on 22 May 2020. Those read as follows:

> "I write further to the directions of UT Judge Smith and confirm that we believe an in-person remote hearing is preferable in this complex matter and also to set aside and remake the decision if possible. There are sensitive issues pertaining to the child which also warrant close consideration to properly consider the arguable errors of law (set out at paragraphs 2 and 3 of the most recent decision). Counsel's grounds are resubmitted (last attachment) and these set those circumstances out.
>
> We would however respectfully refer the court to the Joint Protocol in relation to the sharing of information between the Family Court and Immigration Tribunal which we believe would set out in more detail the domestic violence abuse suffered by the sponsor and the arrangements for the child made by the family court which would provide further detail in relation to the exceptional circumstances and background to this which may assist the UT Judge in their considerations in relation to the best

> interest of the child and contention that there are exceptional, compassionate and compelling factors in play. The requests for consideration of the protocol ahead of the FTT hearings are attached and although we were able to submit some documents from the family court, we believe disclosure of all documents, directly to the UT would be useful, given the stage of this appeal."

8. On 9 June 2020, the Respondent filed a Rule 24 reply. The writer of that reply indicated that she did not have access to the Appellant's file. The Respondent opposes the appeal. As she correctly identifies, the focus of the challenge is the Sponsor's child and the impact on that child. The Respondent points out that the burden is on the Appellant to provide evidence of his relationship with the child. It is accepted by the Respondent (as it was by the Judge) that the Sponsor's financial shortfall might be overcome under Gen 3.1 of Appendix FM to the Rules if sufficient evidence had been provided by the Appellant. That is, though, no longer relevant and the sticking point now is the Sponsor's status and not the financial requirements. Paragraphs Gen 3.2 and Gen 3.3 of Appendix FM may still be relevant and I do not understand the Respondent to dispute that the Appellant may still succeed outside the Rules if a refusal of entry clearance would be disproportionate when considered outside the Rules. The Respondent asserts that the Judge has considered the circumstances of the Appellant, the Sponsor and the Sponsor's child and reached a conclusion which is open to him. The Respondent draws attention in particular to [27] to [30] of the Decision where, she asserts, the Judge has considered the best interests of the child. Finally, the Respondent submits that, if an error of law is found, the appeal should be considered afresh in the First-tier Tribunal.

9. Dealing first with the Applicant's submission that I need to see additional documents from the Family Court when considering this appeal, at this stage I reject that submission. I am here concerned with whether the Decision contains an error of law. As such, it would be neither helpful nor appropriate to consider documents which were not before Judge Law. It might become appropriate if an error of law is found when re-making but that issue requires separate consideration at that stage.

10. The Tribunal has the power to make a decision without a hearing under rule 34 of the Procedure Rules. Rule 34(2) requires me to have regard to the views of the parties. In this case, neither party objects to this course. The exercise of my discretion is subject to the overriding objective in rule 2 to enable the Tribunal to deal with cases fairly and justly.

11. The Appellant is in Pakistan and it is not suggested that either he or the Sponsor wish to participate in an oral hearing which would be concerned only with the legal question whether there is an error of law in the Decision. The Appellant has had two opportunities, via the initial grounds and the further submissions, to set out his case as to the error of law asserted in the Decision. Whilst I recognise that the outcome of the error of law stage is of importance to the Appellant and the Sponsor, as failure at this stage will mean that the Appellant's appeal is dismissed finally, I do not consider that fairness requires an oral hearing of this issue. The grounds are clearly articulated, and I do not consider that amplification by way of oral submissions is

required. The Appellant contends that the issues are complex in nature. I disagree. They are relatively straightforward.

12. It is difficult to see what more could be said orally in support of the grounds if a hearing were to be convened. Although it is possible for the Tribunal to hold remote hearings and even limited face-to-face hearings at the present time, its capacity to do so is reduced from what would normally be available. The convening of an oral hearing is accordingly likely to lead to some delay in the determination of this appeal. I have therefore reached the view that it is appropriate to deal with the error of law issue on the papers and without an oral hearing.

13. At this stage, the issue for me is whether the Decision contains an error of law. If I conclude it does, I need to consider whether I should set aside the Decision based on that error. If I decide to do so, I would either re-make the decision or remit the appeal to the First-tier Tribunal to do so.

DISCUSSION AND CONCLUSIONS

14. I can take all the grounds together. Grounds one and two both concern the adequacy of consideration of the best interests of the Sponsor's child. I do not consider that ground one adds anything as the issue for the Judge is whether refusal of entry clearance breaches the Appellant's right to respect for his family life not whether the Respondent has acted in accordance with the law. In any event, the Respondent's decision under appeal did consider the existence of the Sponsor's child but concluded that her best interests were not of relevance because the child is not that of the Appellant. The Judge had however to consider the child's best interests for himself on the evidence before him. The adequacy of the Judge's findings in that regard are then relevant to ground three concerning the Appellant's ability to form a family life with the Sponsor's child and ground four concerns the proportionality balance which includes the relevance of the Sponsor's status in the UK.

15. In relation to the Judge's consideration of the best interests of the child, the Respondent draws my attention to [16] of the Decision coupled with [27] to [30] of the Decision. In relation to the entirety of the grounds, it is appropriate to read those paragraphs in conjunction with what is said at [19], [20], and [23] to [26] of the Decision and the conclusion at [31]. The Judge's reasoning as a whole is as follows:

> "16. In this case, I consider it is appropriate to go on and consider the appeal under Article 8 itself. This is because of the argument that the appellant has now demonstrated an income of more than the minimum threshold, and that the consequences of dismissing her appeal would be a disproportionate lack of respect for his family life and the family life of the sponsor and her child. In addition, Appendix FM does not make specific provision for considering the reasonableness or proportionality of requiring an applicant to make a further application, with the consequent delay, which is analogous to the situation in **R (on the application of Chen) v SSHD (Appendix FM – Chikwamba – temporary separation – proportionality) IJR [2015] UKUT 00189 (IAC)**.
>
> …

19. I am satisfied that the appellant has family life with the sponsor since they are married, have lived together briefly as man and wife in Pakistan and maintain contact by social media and further visits. The refusal of the application interferes with that family life in the sense that it shows a lack of respect for it. I note that the respondent does not dispute that the appellant has a genuine and subsisting relationship with the sponsor, and I find that to be the case.

20. I am not satisfied that the appellant has family life with the sponsor's daughter, since she is not his child and there is no evidence of dependency between them, other than the emotional bond to which the sponsor referred in evidence.

…

23. With regard to the amended section 117B(2) and (3) of the 2002 Act, which apply as much to those seeking to enter the UK as those seeking to remain, I am satisfied that the appellant is able to speak English to the required standard since otherwise his application would have been refused on that additional ground. However, I have no evidence as to whether he is financially independent, other than what the sponsor said about him recently starting work as a salesman after having previously done 'various bits of work'.

24. Even though the appellant did not demonstrate that she could meet the financial requirement at the date of application, I am satisfied the sponsor's income does now exceed the required threshold of £18,600.

25. Article 8 does not create a right for married couples to choose to live in a Contracting State. In **SS (Congo) and Others [2015] EWCA Civ 387** in relation to one of the appeals, the sponsor had arrived in the UK aged 7 from Somalia; he became a British citizen in 2010. He and the appellant entered the marriage knowing in effect she would have to comply with the Immigration Rules, as did this appellant. Richards LK said that the fact that the sponsor would lose his job in the United Kingdom if he had to leave to enjoy family life elsewhere and hence would prefer to establish family life here did not constitute compelling circumstances to require the grant of leave to remain outside the rules.

26. In the **Chen** case referred to above, it was held that in all cases, it will be for the individual to place before the respondent evidence that such further separation will interfere disproportionately with protected rights.

27. The best interests of the child require that she continue living with her mother and it is relevant that the 2016 court order prevented her mother taking her to Pakistan to live with the appellant whether on a permanent or temporary basis, in the absence of the consent of her birth father or a further court order. That order was made by the family court in August 2016 (page 56 in the appellant's bundle) and required the sponsor to ensure that her child was available to spend time with her father on specified dates from August to November 2016 and then on alternate weekends starting in January 2017. No further court order has been disclosed, but I note from paragraph 22 of the sponsor's statement that she took her daughter to Pakistan for her brother's wedding in 2017 without the father's permission

and '*did so because he previously refused to grant permission.*' The sponsor presumably obtained a further court order before doing so and she states in paragraph 24 that the only contact between the child and the father since October 2017 has been through letters and cards every three months.

28. I also take into account that the sponsor's daughter is a Pakistani citizen according to her passport at page 50 of the appellant's bundle and there would therefore be no obstacle in that respect to her accompanying her mother to visit the appellant, as long as the sponsor abides by the 2016 family court order or any subsequent amendment to that order.

29. I also take into account that the sponsor has lived in the UK since December 2006 and would prefer to stay here.

30. As referred to by the entry clearance manager in the review conducted after the grounds of appeal were received and details of the court order became known, the appellant and sponsor decided to marry in the knowledge that he would need a visa which was not guaranteed. The only document in the bundle (page 21) relating to the sponsor's status is the grant of limited leave to remain until 24 December 2017. The sponsor does not say in her statement whether a further grant of leave to remain has been made, but there must be one as she has travelled to Pakistan in 2018 and 2019. I note that the application form completed by the appellant (Part 6 – sponsor details at question 70) describes the sponsor as a temporary resident in the UK, which I find means he was aware that she did not have settled status. Contrary to what is said in the grounds of appeal about the sponsor being unable to afford to visit her husband, the sponsor did subsequently visit him for two weeks in June 2019.

31. Taking all these considerations into account, I am satisfied that the respondent's decision is proportionate, since the appellant and sponsor knew when they married that entry clearance was not guaranteed and their family life can continue to be conducted by means of social media and visits as it has been until now. I have not been told how long it will be before the sponsor is entitled to indefinite leave to remain, so I have not been able to take that period into account, but there is no reason why family life cannot continue on the same basis in the meantime."

16. Dealing first with the child's best interests, whether the Judge was obliged to consider the position of the child under Gen 3.3 of Appendix FM to the Rules is frankly irrelevant. The Judge was obliged to consider those interests and did so. I reject the submission that the Judge failed to carry out any welfare assessment. However, I consider that there are two errors made by the Judge when doing so. First, the Judge concludes that there is no family life between the Appellant and the child based on lack of dependency. That is the appropriate test for adult dependents even where there is a family relationship and the Judge may be right to consider that it applies also to the position between non-biological parents and children. However, the Judge considers that issue too narrowly and appears to confine consideration to the financial position. That is evident from the Judge's apparent acceptance at [20] of the Decision of the Sponsor's evidence that the Appellant has an emotional bond with the child.

17. Second, and flowing from that, the Judge confines consideration of the child's best interests at [27] of the Decision to the relationship between the child and her biological parents. There is no consideration there of two factors. First, that the child has lived the entirety of her life in the UK, save for occasional visits to the Appellant and other family members. The child is not a British citizen; she has leave in line with her mother. Nor indeed do I understand the Judge to conclude that it would be in her best interests to relocate permanently to Pakistan even if she is a citizen of that country. The Judge's conclusion at [28] of the Decision is that she could continue to visit the Appellant with her mother as she does now. That however begs the question which is the second factor of the child's best interests viz a viz her relationship with the Appellant who, according to the evidence, she views as her father. There is no consideration by the Judge whether it is in the child's best interests to remain living with her mother but apart from her stepfather (save for occasional visits). There is no independent evidence in that regard but there is some detail in the witness statements of the Appellant and the Sponsor as to the depth of relationship and what it is that the child misses about having her stepfather living with her in the UK. That is not considered.

18. There is therefore a failure to consider relevant evidence which amounts to an error of law. I therefore set aside the Decision. I do not preserve any findings.

19. Strictly speaking, having found an error in relation to ground two, I do not need to go on to consider whether there is an error established in relation to the other two grounds. However, I do so because my comments may be relevant to the re-making of the decision.

20. Although the way in which the Appellant's ground three is formulated crosses with what I have said above, it is of course the case that a Judge considering this case is concerned with permitting the development of family life within the UK rather than, as in a removals case, the interference with family life already established here. That is however recognised by the Judge at [25] and [26] of the Decision. Cases dating as far back as Abdulaziz, Cabales and Balkandali v United Kingdom in 1985 have recognised that there is no general obligation to respect a choice of country in which family life may be established and continued.

21. Moreover, here, family life has been continued between the Appellant and the Sponsor at distance for two years now. It is for the Appellant to demonstrate the level of interference which refusal of entry clearance has with his ability to continue family life and why he should be permitted to come to the UK to continue that family life on a permanent basis rather than, as now, on a temporary basis via visits. It is also for the Appellant (and the Sponsor) to show why it would be unjustifiably harsh for them to continue their family life in Pakistan.

22. That leads me on to a further unusual factor in this case which is the reason why the Appellant is unable to meet the Rules. Both the Sponsor and her daughter are Pakistani nationals. Although her daughter was born in the UK, I have seen no evidence to suggest that she has British nationality. The evidence suggests that she too has only limited status in the UK.

23. The evidence is also unclear about how and why the Sponsor was granted limited leave to remain. Unfortunately, the letter indicating a grant of leave to remain outside the Rules at [AB/21] is missing the second and third pages. The Sponsor says that her ex-husband did not have immigration status in the UK, and I assume that is the reason why the Sponsor's daughter is not a British citizen from birth. Leave to remain is not therefore apparently granted based on the Sponsor's relationship with her daughter. Her daughter is not a "qualifying child". I note that Judge Laws says that the Sponsor has leave until December 2017 and it is not clear what is her status thereafter. That ignores the evidence at [AB/20] that she has leave to remain from 27 April 2018 to 1 November 2020. I accept, on that basis, that if, as the Sponsor says in her statement, she is on the ten-year route to settlement, she has completed only five years of the ten years. It is however relevant to the proportionality assessment that she has only temporary status in the UK as does her daughter and that both are nationals of the country in which the Appellant resides.

24. I turn to the point made in the submissions regarding further evidence from the Family Court and the invocation of the Joint Protocol for disclosure of further documents from those proceedings. It will be recalled that those proceedings are concerned with the relationship between the Sponsor and her daughter on the one hand and the Sponsor's ex-husband and the child's father on the other. The important relationship in the re-making of the decision is between the Appellant and the Sponsor's child and not between that child and her biological father. I therefore find it difficult to see what relevance further documents arising from those proceedings might have. If they are of relevance, the Appellant's solicitors can make an application explaining the relevance which will be considered.

25. Finally, in relation to the re-making of the decision, I see no reason to remit the appeal. There are no issues of credibility. The case involves an assessment of the Article 8 rights of those affected by the decision. For that reason, I retain the appeal for re-making in this Tribunal. Although there is no application to adduce further evidence, I consider it appropriate to allow the Appellant the opportunity to file further evidence, in particular about his relationship with the Sponsor and her child. It would also be helpful for the Tribunal to understand the basis on which the Sponsor has been given leave to remain in the UK.

26. For the foregoing reasons, I am satisfied that the Decision contains a material error of law. I set aside the Decision. I have made directions below for a resumed hearing.

DECISION

I am satisfied that the decision of First-tier Tribunal Judge JWH Law promulgated on 11 December 2019 discloses an error of law. I set aside that decision. I make the following directions for a resumed hearing:

1. **Within 28 days from the date when this decision is sent, the Appellant shall file with the Tribunal and serve on the Respondent any further evidence on which he wishes to rely.**

2. The appeal is to be relisted for a hearing via remote means (Skype for Business).

In relation to that hearing, no later than 14 days after this decision is sent, the parties shall file and serve by email

(i) Skype contact details and a contact telephone number for any person who wishes to attend the hearing remotely, which might include the advocates, instructing solicitor, the Appellant and any other witnesses;

(ii) dates to avoid.

3. The parties are at liberty to apply to amend these directions, giving reasons, if they face significant practical difficulties in complying.

Signed: *L K Smith* Dated: 27 July 2020
Upper Tribunal Judge Smith