Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/41696/2013

THE IMMIGRATION ACTS

Heard at Newport	**Determination Promulgated**
On 11 November 2014	**On 02 December 2014**

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

RAMI SAMIR SULEIMAN SALAH
(ANONYMITY DIRECTION NOT MADE)

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr B Singh instructed by I A S
For the Respondent: Mr I Richards, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a citizen of Jordan who was born on 24 March 1980. On 26 February 2013, he applied for a residence card as confirmation of his permanent right of residence in the UK as the spouse of an EEA national under the Immigration (EEA) Regulations 2006 (SI 2006/1003 as amended). On 20 September 2013, the Secretary of State refused to issue such a residence card on the basis that the appellant had failed to

establish that his spouse (from whom he had separated) had resided in the UK in accordance with the EEA Regulations for a continuous period of five years.

2. The appellant appealed to the First-tier Tribunal. In a decision promulgated on 23 June 2014, Judge Burnett dismissed the appellant's appeal under the EEA Regulations.

3. Before the Judge, the appellant also relied upon his relationship with a British citizen, Ms Reed and her four year old son. Judge Burnett concluded that the appellant could not succeed on the basis of a relationship with Ms Reed or her son under Appendix FM and further could not establish a claim based on his private life under para 276ADE. Neither of those finding is challenged. In addition, the Judge considered the appellant's claim to remain under Article 8 of the ECHR. First, he concluded that the relationship between Ms Reed and the appellant did not constitute "family life" for the purposes of Article 8. Nevertheless, he went on to consider the "nature and quality of the relationship" as an aspect of the appellant's private life. Judge Burnett concluded that there were no "exceptional circumstances" such as to outweigh the public interest given that the appellant could not meet the requirements of the Rules. Finally, he concluded that balancing "all the known factors and competing interests" the respondent's decision was "clearly proportionate".

4. The appellant sought permission to appeal on a number of grounds relating to the Judge's decision to dismiss the appeal under Article 8. Permission was granted by the First-tier Tribunal (Judge V A Osborne) on 12 August 2014. Thus, the appeal came before me.

Submissions

5. Mr Singh, who represented the appellant, recognised that he could not make good the ground in paragraph 4 of the grounds that the Judge had failed to make a "clear finding" in relation to whether the appellant had family life. The Judge clearly did that in paragraph 52 when, having considered the evidence, he stated:

> "I do not therefore find that this constitutes 'family life' within the meaning of the Convention."

6. Instead, Mr Singh made a number of submissions. First, Mr Singh submitted that the Judge had fallen into error in finding that the relationship between Ms Reed and the appellant did not give rise to "family life" based upon a distinction between the appellant being her "boyfriend" but not her "partner". Mr Singh submitted that given the evidence of the relationship between the appellant and Ms Reed it was irrational of the Judge not to find that there was "family life" between them. Secondly, Mr Singh submitted that the Judge had failed to properly consider whether there were "exceptional circumstances" outside the Rules which did not cater for the situation where they did not "live

together". Thirdly, he submitted that the Judge had failed to consider the best interests of Ms Reed's child in accordance with s.55 of the Borders, Citizenship and Immigration Act 2009 given the evidence concerning the appellant's relationship with Ms Reed's son, namely that he spent most weekends with Ms Reed and her son and that he spent time alone with her son babysitting so that Ms Reed could go out.

7. Mr Richards, on behalf of the Secretary of State, submitted that there had been no material error of law. First, he submitted that the distinction drawn by the Judge between Ms Reed being the appellant's "boyfriend" but not her "partner" was simply her evidence which the Judge accepted. Mr Richards submitted that the Judge had considered Ms Reed's evidence at paras 38 and 39 of his determination and had noted Ms Reed's evidence that she was proceeding cautiously in making any commitment to the appellant given his uncertain immigration status. Mr Richards submitted that it was properly open to the Judge to find that there was no "family life" between her and the appellant. In any event, Mr Richards submitted that the Judge had considered the "nature and quality of the relationship" as an aspect of the appellant's private life. Secondly, Mr Richards submitted that, in relation to s.55 of the 2009 Act, there was nothing before the Judge dealing with the best interests of Ms Reed's son. The fact that the appellant saw him on weekends and babysat for Ms Reed did not strengthen the appellant's claim. Mr Richards submitted that it would be extraordinary if the appellant could not succeed on the basis of his relationship with Ms Reed but could do so on the basis that he saw her son on weekends and babysat for him. Mr Richards submitted that the Judge's failure to consider s.55 was not material; he would have given the point 'short shrift' and he invited me to dismiss the appeal.

Discussion

8. Dealing first with the issue of whether the Judge erred in law in finding that there was no "family life" between the appellant and Ms Reed, the Judge set out Ms Reed's evidence at paras 34 and 38-39 as follows:

> "34. She explained that she had first met the appellant in 2010 and got to know him through an internet dating site. She was not looking for a relationship at the time as she had just come out of a 17 year relationship. They had got to know each other and their relationship got more intense. She did not live with him as she did not want the relationship to be too intense and for there to be too much reliance. She did not want her son to get too emotionally attached…
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> ….
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> 38. She stated that the appellant was her "boyfriend" not her partner. They had discussed marriage and he had asked her to marry him at the Queens Jubilee. She stated she would have had a baby with the appellant earlier if the appellant's situation had been different, but she was "on guard". They had been quite serious the last couple of years and that is why she had attended the Tribunal.

> 39. She confirmed that they had been on holiday together to Egypt. Her son was 4 nearly 5 and the appellant had spent a considerable time with him. They saw each other most weekends and he saw her son then. Her son was born on 18th July 2009. She stated that the appellant had spent time alone with her son as he babysits so she can go out. The relationship was as it was as she did not want to be reliant upon the appellant until his situation was sorted out. She stated it would be nice to be able to move on and they were living in limbo at the moment. She stated that one way or another they would know the position once the decision was made."

9. At para 52 the Judge reached the following conclusion on the basis of that evidence:

> "He has a relationship with Ms Reed. The appellant's evidence seemed to conflict with Ms Reed's evidence as to when and how the relationship started. However, it was clear from Ms Reed's evidence, that she has been cautious and guarded because of the appellant's immigration status. She does not refer to him as her partner and makes a distinction between "boyfriend" and "partner". This perhaps demonstrates the depth of the relationship and whether it will continue. They do not live together and have never done so. I do not therefore find that this constitutes "family life" within the meaning of the convention. However, I have in any event considered this aspect in the proportionality exercise and the nature and quality of the relationship. "

10. The concept of "family life" under Article 8 is not clearly defined in the case law. Its existence is ultimately a question of fact and it is for an appellant, in an appeal before the First-tier Tribunal, to establish that his or her relationship with another amounts to family life. It is well recognised that the subsisting relationship between a married couple and the relationship between parents and their children amount to family life for the purposes of Article 8. It has also been recognised that family life may continue between a parent and an adult child who, for example, continues to have a dependency upon his/her parents by continuing to live with them and be financially dependent upon them such that he or she has not yet acquired an independent life (see Ghising (Family Life – Adult – Gurkha Policy) [2012] UKUT 00160 (IAC)). It is equally clear that the notion of a "family" and the "family life" protected by Article 8 requires no particular form and the issue is one of substance based upon "the real existence in practice of close personal ties" (see K v UK (1986) 50 DR 199 at [207]). The law is summarised in Lester, Pannick and Ehrberg (eds) *Human Rights Law and Practice* (3rd Edn, 2009), at 4.8.44 as follows:

> "The existence of a formal union between adults accompanied by some evidence of cohabitation or consummation is sufficient to give rise to the existence of family life. Indeed, engagements to marry, when accompanied by sufficient evidence of the strength of intention or establishment of relations, may give rise to family life. But the notion of family life goes beyond the mere formal and covers other 'de facto family ties'. It includes the relationship between unmarried adults even if not formally or legally endorsed or recognised, provided such relationships are sufficiently enduring. Key factors of the stability of the relationship, the

> intention of the parties and (though by no means determinative) cohabitation."

11. In the instant appeal, the Judge was entitled to take at face value Ms Reed's evidence that she saw the appellant as her "boyfriend" but not yet her "partner". She expressed in her evidence caution in pursuing their relationship because of his situation. Her evidence was that she did not live with the appellant and she did not want the relationship to become "too intense" and for there to be "too much reliance" or for her son to become "too emotionally attached" to the appellant. She was "on guard". The Judge fully took into account that they had been on holidays together and that the appellant saw Ms Reed (together with her son) most weekends and babysat for her son when Ms Reed went out. On this evidence, it was open to the Judge to conclude that the nature of their relationship <u>at present</u> was not such as to give rise to "family life" protected under Article 8 of the ECHR. The Judge did not misdirect himself as to the need to consider the "nature and quality" of the relationship. Whilst Art 8 does, of course, require protection for developing future family life, that obligation however only arises if there is existing family life as a base for that development. I reject Mr Singh's submission that there was only one rational outcome on these facts, namely that family life existed between the appellant and Ms Reed. His factual finding required a judicial assessment of the evidence and his conclusion was not one which no reasonable judge could reach, namely that the evidence did not establish the "close personal ties" of sufficient strength to amount to family life under Article 8 of the ECHR. Consequently, I reject Mr Singh's submission that the Judge erred in law in concluding that no family life had been established between the appellant and Ms Reed.

12. I now turn to Mr Singh's remaining submission concerning the Judge's approach to Article 8 of the ECHR.

13. First, it is clear that the Judge made no specific reference to s.55 of the 2009 Act and the best interests of Ms Reed's four year old son. However, the Judge can only deal with the circumstances presented to him in the evidence. The evidence was that the appellant spent time with Ms Reed's son on the weekend and babysat on occasion in order for Ms Reed to go out. Ms Reed's own evidence was that she exercised caution in her relationship with the appellant because she did not want "her son to get too emotionally attached" (see para 34 of the determination). There was no specific evidence that Ms Reed's son would suffer any harm or prejudice if the appellant were removed. It was, in my judgment, inevitable that the Judge would decide on this evidence that the best interests of Ms Reed's son were to continue being brought up by his mother which she had done alone since her previous seventeen year relationship had come to an end in 2010.

14. Secondly, in any event, the child's best interests could not have conceivably outweighed the public interest reflected in the fact that the

appellant had no lawful basis for being in the UK. His relationship with the appellant was formed at a time when he had separated from his EEA spouse and, although he had a residence card as a family member of an EEA national issued on 6 March 2008 and valid until 6 March 2013, his right of residence, given his inability to establish that his separated wife was exercising Treaty rights did not exist. Although his position might not be considered as precarious as that of a person who required leave to remain in the UK and had none, as the evidence of both the appellant and Ms Reed recognised, his immigration status was uncertain. Only in exceptional circumstances will the removal of an individual where the relationship was formed in such circumstances be disproportionate under Article 8 of the ECHR (see R (Nagre) v SSHD [2013] EWHC 720 (Admin) at [38]-[41]).

15. The Judge considered whether there were any "exceptional circumstances" in the sense of "compelling reasons" to outweigh the public interest in effective immigration control. Mr Singh submitted that the Judge had failed to give clear reason for his finding and that it was clearly irrational for the Judge to state at [54] that the appellant could continue his relationship with Ms Reed by correspondence, telephone calls and occasional visits. Given that the appellant could not meet the requirements of any of the Immigration Rules, the Judge correctly approached the issue of Article 8 by, having reached the decision in relation to the Rules, considering whether there were "exceptional circumstances" which presented "compelling reasons" to outweigh the public interest. (see MF (Nigeria) v SSHD [2013] EWCA Civ 1192 and R (Nagre). The Judge did not, as Mr Singh submitted, simply determine that there were no "arguable" circumstances falling outside the Rules which could give rise to exceptional circumstances which Mr Singh submitted, was contrary to the Court of Appeal's disapproval of Gulshan (Article 8 – New Rules – Correct Approach) [2013] UKUT 00640 (IAC) in R ((MM) Lebanon) and Others v SSHD 2014 EWCA Civ 985 at [129]. The unfortunate truth for the appellant was that there simply were no "compelling circumstances" which could possibly outweigh the public interest. It was, perhaps, unrealistic of the Judge to consider that the appellant's relationship with Ms Reed (even if it did not constitute family life) could continue by correspondence, telephone calls and occasional visits. However, the evidence did not establish that there would be unjustifiably harsh consequences sufficient to outweigh the public interest on the `evidence.

16. In his submissions, Mr Singh pressed the point that the appellant was not legally represented at the hearing. It was, nevertheless, for the appellant to establish his claim under Article 8 including leading such evidence as he wished to rely on. Both he and Ms Reed gave oral evidence concerning their relation which was, after all, not the basis of his original application based upon his relationship with his separated EEA spouse. The Judge clearly and fully recorded the evidence of the appellant and Ms Reed concerning their relationship. He was entitled to conclude that the relationship did not amount to family life under Article 8 and that there

were no "compelling" circumstances which were justified, on the evidence, the grant of leave to the appellant outside the Immigration Rules under Article 8.

17. For these reasons, the Judge did not materially err in law in dismissing the appellant's appeal. His decision stands.

Decision

18. Accordingly, the appellant's appeal to the Upper Tribunal is dismissed.

Signed

A Grubb
Judge of the Upper Tribunal
Date: