Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/44872/2014

THE IMMIGRATION ACTS

Heard at City Centre Tower, Birmingham	**Determination Promulgated**
On 17 June 2015	**On 6 July 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE ROBERTSON

Between

THADDEUS MARK MARSHALL
ANONYMITY DIRECTION NOT MADE

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr D Bunting, Counsel, instructed by Dassur, Solicitors.
For the Respondent: Mr D Mills, Home Office Presenting Officer

DETERMINATION AND REASONS

Claim History

1. The Appellant, who is a citizen of Jamaica, applied for leave to remain in the UK on the basis of his private and family life with Ms Berdy Thompson, a British citizen, and her children, who were aged 9 and 13, from a previous relationship. His application was refused by the Respondent and his appeal against that decision was dismissed by First-tier Tribunal Judge Thomas, who heard the appeal on 22 January 2015 and her decision was promulgated on 20 February 2015.

2. In the grounds of application, it is submitted that:

    a. In assessing whether it was disproportionate to remove the Appellant from the UK, the Judge overstated the significance of the Appellant's immigration history, and failed to distinguish between the Appellant and the appellant in **LC China [2014] EWCA Civ 1340**, in which it was held not to be disproportionate for the appellant to be deported even though he was the biological father of the children. However, that was a deportation case and the Appellant's case was one of administrative removal. It was submitted that the Judge placed too little weight on the interests of the children relative to the immigration history of the Appellant and failed to assess the factors relating to proportionality correctly (grounds, paras 12 - 13, 15, 18 and 20);

    b. There was no recognition by the Judge of the fact that the Appellant was under 18 when he entered the UK and whilst the Appellant and Ms Thompson embarked on their relationship when he had no status in the UK and little weight could be given to that private life, the children "were obviously not party to the evasion of immigration control". It is submitted that the Judge erred in giving little weight to the private life between the Appellant and the children (grounds, para 15);

    c. When considering whether alternative arrangements could be made in relation to practicalities if the Appellant were to leave the UK, the Judge placed too little 'emphasis' on the emotional support that the children obtain from the Appellant (grounds, para 16).

3. The Appellant was granted permission to appeal by First-tier Tribunal Judge Simpson on the basis that "having found that (the Appellant) has an established family life with his partner's children it is arguable that the impact of A's removal on their physical and emotional welfare has not been adequately considered, and that whilst the Judge was entitled to give little weight to (the Appellant's) private life as an overstayer, he has not given sufficient weight to A's family life with those children. Finally, given the Judge's emphasis on the fact that A is not their natural father, it is arguable that the Judge ought to have made a finding as to whether the children have contact with their biological father or whether A is, in reality, their father figure."

Submissions

4. Whilst the grounds of appeal before the Judge were widely drawn, it is clear from the submissions recorded in the decision at [15] that the focus of the hearing was an appeal under Article 8 ECHR only. The Judge records the Respondent's case at [10 – 13] and at [19] confirms that the Appellant does not meet the provisions of the Immigration Rules; she states that "The Appellant does not seek to argue otherwise," and finds that the Respondent's decision under the Immigration Rules is lawful. Mr Bunting

submitted at the outset that he wished to withdraw the concession made on behalf of the Appellant that he could not succeed under the Immigration Rules because once the Judge had found that there was a genuine relationship between the Appellant and the Sponsor, then the Appellant could potentially have succeeded under the Immigration Rules because he was an overstayer. However, a Judge is entitled to rely on a concession made during the hearing and she cannot be said to have erred in law in relying on that concession. There is nothing within the decision to suggest that it was argued that there was sufficient evidence before the Judge for her to find that the definition of partner within Gen.1.2 was met. In view of the fact that a concession was made, it was too late to withdraw the concession before the Upper Tribunal in order to attempt to establish an error of law.

5. In the grounds of application at para 13 there is reference to the Judge 'overstating the significance of' the Appellant's immigration history, and at para 16 to the Judge 'placing too little emphasis on' the emotional support that the children obtain from the Appellant. Mr Bunting was asked if what in fact was being submitted was that the Judge weight that the Judge placed on these factors in the assessment of proportionality should have been different. He confirmed that it was, stating that in fact what was being submitted on behalf of the Appellant was that the Judge had erred in her assessment of proportionality.

6. Mr Bunting essentially relied on the grounds of application and the written submissions on behalf of the Appellant, submitting that the point was a narrow one and related to the decision on proportionality, which he accepted was for the Judge and one on which there is wide latitude. However, he submitted that the decision on proportionality was unsustainable because, having emphasised at [25] and [29] that the Appellant was not their biological father, the Judge failed to make a finding as to whether the Sponsor's children had any contact with their biological father and whether the Appellant was their de facto father. He further submitted that the Judge had failed to engage with the fact that they were a family unit and whilst acknowledging that he had a 'role within their lives' at [25] she failed to assess what that role was, which included the emotional and practical support that he offered them which enabled the Sponsor to work; she focussed on the Appellant's poor immigration history, when he was in fact a minor when he became an overstayer, and she did not look at all the factors in the assessment of proportionality. He submitted that these issues were capable of making a material difference to the outcome of the proportionality exercise.

7. When asked about what evidence that was before the Judge, Mr Bunting stated that there were witness statements from the Appellant and the Sponsor and a letter from the school.

8. Mr Mills relied on the Rule 24 response, submitting that the matter of weight to be attached to particular evidence was for the Judge, that the Judge had considered all relevant factors, that her decision was not

irrational and that no errors of law were disclosed. She had specifically referred to the role the Appellant played in the lives of the children at [25], stating that this "…includes caring for their main needs when their mother is at work, and taking and fetching them from school." He submitted that when asked to point to the evidence before the Judge, there was nothing in the bundle, not even in the letter from the school to suggest that the Appellant was the only carer for the children, and there was no comment on the quality of the relationship from the school. The evidence supported what the Judge had recorded at [25]. He further submitted that the Judge had given appropriate weight to the relationship between the Appellant and the children, that she had reached a rational conclusion. He argued that one way to look at it is to consider that a biological father who had overstayed could be proportionately removed if the best interests of the children could be maintained by the mother.

9. Mr Mills submitted that in the further written submissions made, the Appellant's representatives sought to submit that the Respondent's decision under s 55 of the Borders, Citizenship and Immigration Act 2009 "appears to have been based on an incorrect factual premise that there was no evidence that the Appellant has involvement in the children's lives or that they are emotionally dependent on him, which was not accepted by the IJ" and that therefore, under **MK (section 55 – Tribunal options) Sierra Leone [2015] UKUT 223 (IAC)** , the Respondent's decision was unlawful. However, he submitted, the Respondent's decision was predicated on there being no subsisting relationship between the Appellant and the children and the Respondent therefore did not need to consider s 55 on the basis that there was a subsisting relationship between them. Furthermore, this argument was not put to the Judge. She reached a different conclusion from the Respondent and went on to make the s 55 assessment and did so to a legally sufficient standard.

10. In reply, Mr Bunting essentially relied on his previous submissions, but made the point that if the fact that the Appellant was not the biological father of the children was not relevant, why did the Judge refer to it if she did not give weight to it in the proportionality exercise? He submitted that it had been incorrectly factored into the proportionality exercise. The Judge had stated that she gave little weight to the relationship that was formed when the Appellant was an overstayer under s 117B; this may be true of the relationship between the Appellant and his partner but not the Appellant and the children.

11. Both representatives agreed that if I found that there was a material error of law in the decision of the Judge, I could go on to remake the decision on the basis of the evidence that was before me.

Decision and reasons

12. The Judge found that the Appellant had an established private and family life with Ms Thompson and her children which deserved respect [23], that the Appellant is not their real (i.e. biological) father but she accepts that

he has a role in their lives which includes caring for their main needs when their mother is at work and taking and fetching them from school, that "Whilst the Appellant's removal is likely to cause disruption to their lives, there is no evidence to suggest that they would suffer physical or emotional harm as a result" [25], that the Appellant's poor immigration history was without reasonable explanation [26], that he is not subject to deportation, that she can give little weight to his life with Ms Thompson under s 117B [28], that Ms Thompson and the children have a choice as to where they will live [29]. Balancing the relevant factors, she decided that the Appellant's right to private and family life did not outweigh the public interest in immigration control.

13. In relation to the grounds, as a general observation, there is reference to the weight attached (paras 15 and 18 of the grounds) by the Judge to evidence, the "emphasis on" particular evidence by the Judge (grounds para 16) and the Judge overstating the "significance of" particular evidence. These all amount to no more than a submission that the Judge should have attached more or less weight to the factors within the proportionality assessment. However, weight is a matter for the Judge; as provided by **FK (Kenya) [2010] EWCA Civ 1302**, at para 23. There is nothing before me to substantiate the ground that the Judge erred in law in the weight she attributed to the evidence.

14. Taking firstly the terms in which permission to appeal was granted, it is difficult to see how it can be argued that the physical and emotional impact of the removal of the Appellant had not been adequately considered when there appeared to be no evidence before the Judge that they are likely to suffer physical or emotional harm. When the Judge referred to the Appellant "caring for their main needs when their mother is at work", it can be inferred that she was not referring merely to their physical needs, particularly as in the written further submissions at para 13 it appears to be accepted that the Judge, contrary to the conclusions of the Respondent, had found that the Appellant was involved in the children's lives and that they are emotionally dependent on him. In finding that there was family life between the Appellant and his partner and the children at [23], it can be inferred that she accepts there is physical and emotional support between them. There is therefore no arguable merit in the grounds at paragraph 15.

15. In the grounds of application, at paragraph 15, it is stated that the Judge should have given weight to the Appellant's private life with the children, even if she gave little weight to the Appellant's private life. However, when the whole of [28] is considered, it is clear that the Judge states that it is the relationship with the Appellant's partner to which she can give little weight (pursuant to s 117B(4)(b)). The Judge considered proportionality (applying Article 8 directly) simply because she found that the interest of the Appellant's partner and children had not been adequately considered under the Rules. There was no real dispute as to the facts and it can be inferred that she accepted that he was a part of their lives (as stated at [25]); she therefore did give weight to both private and family life with the

children, noting "clearly if possible, it is favourable for the Appellant to remain in their lives". The Judge accepted that the Appellant had a relationship with the children. It is therefore not arguable that she did not give weight to his private and family life with the children.

16. In the grounds of application, at paras 10 – 14, it is submitted that the Judge considered the main issues in the appeal to be the poor immigration history of the Appellant and the children, that she overemphasised his poor immigration history and, having emphasised that the Appellant was not the biological father of the children, she should have made a finding as to whether they see their biological father or whether the Appellant is, in reality, their father figure. However, the Judge clearly recorded the evidence before her. She states at [5], "Both children call him 'Dad'. They have no contact with their biological father." This evidence was not challenged by the Respondent at the hearing and not rejected by the Judge and it can be inferred from [25] of the decision that she was mindful of it when she reached her conclusions as to the best interests of the children. The fact that she has referred to the Appellant not being their biological father twice (at [25] and [28]), does not undermine her finding that there is family life between them. This ground therefore lacks arguable merit.

17. As to the Judge having overstated the relevance of the Appellant's immigration history (failing to recognise that he was a minor when he entered the UK), and failing to distinguish **LC (China)** because that concerned a deportation case, I find that the Judge was aware that the Appellant was a minor when he entered the UK, and it is accepted in the grounds of appeal that he was 17 years of age on entry. However, he then became an adult shortly thereafter and still failed to regularise his stay. There is nothing within the decision that establishes that the Judge was confused as to the age he was when he entered; during most of the period that he was an overstayer, he was over 18. There is also nothing within the decision which establishes that the Judge was confused as to the basis on which the Appellant was being removed; she was aware that he was not being deported [28]. This ground lacks arguable merit and no material errors of law are disclosed.

18. As to the further written submissions in relation to s 55, the correct position is as submitted by Mr Mills; where the Respondent, on the evidence before her, finds that there is no subsisting relationship between an appellant and his claimed partner and her minor children, the s 55 exercise will necessarily be brief. Where the Judge finds on appeal that there is family life, this does not render the Respondent's decision unlawful when it was made and it is for the Judge to consider the best interests of the children as part of the assessment under Article 8 ECHR. The submission that the Respondent's decision was not lawful for failure to properly consider s 55 was not put to the Judge. Having found that there was family life between the Appellant and his partner and children, the Judge considered the best interests of the children on the basis of the

evidence before her at [25], and her decision is not irrational or perverse and no arguable material errors of law are disclosed.

19. The Judge made findings of fact that were open to her on the evidence before her; her findings are not perverse or irrational. As to where the balance is to be drawn in a proportionality exercise, this is a matter for the Judge. It has not been established that the Judge materially erred in law in reaching her decision and the grounds are simply a disagreement with her findings.

Decision

20. The determination of Judge Thomas contains no material errors of law and the decision therefore must stand.

21. The Appellant's appeal is dismissed.

22. There was no application for an anonymity order before the First-tier Tribunal or before me. In the circumstances of this case, I see no reason to direct anonymity.

Signed Date

M Robertson
Deputy Judge of the Upper Tribunal

TO THE RESPONDENT
FEE AWARD

In light of my decision, I have considered whether to make a fee award under Rule 9(1)(a)(costs) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 and section 12(4) (a) of the Tribunals Courts and Enforcement Act 2007.

I have had regard to the Joint Presidential Guidance Note: Fee Awards in Immigration Appeals (December 2011). As the Appellant's appeal has been dismissed, I confirm the fee award of Judge Hamilton.

Signed Dated

M Robertson
Sitting as Deputy Judge of the Upper Tribunal