IAC-AH-CJ-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/03070/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 26 October 2017	**On 12 January 2018**

Before

UPPER TRIBUNAL JUDGE KOPIECZEK

Between

SM
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr J Gajjar, Counsel
For the Respondent: Ms H Aboni, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Bangladesh, born in 1984. He is said to have arrived in the UK in 1986, although the respondent has expressed doubt about that claim.

2. A decision was made on 8 July 2015 to refuse leave to remain, based on Article 8 of the ECHR, the emphasis in the application being on the appellant's family life.

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3. The appellant appealed against that decision and his appeal came before First-tier Tribunal Judge M.R. Oliver ("the FtJ") on 2 December 2016. The FtJ dismissed the appeal. The further context of the appeal is best illustrated with reference to the FtJ's decision.

The decision of the FtJ

4. The FtJ referred to the appellant's claim to have arrived in the UK illegally with the help of an agent on 10 June 2006, using a false passport, and that he had remained ever since without leave. He then referred to other aspects of the appellant's immigration history. That included that it appeared that on 2 December 2014 he applied for leave to remain on the basis of family and private life, when he was in the process of finalising his divorce from his present wife, and his new partner was also going through a divorce. She had three children with whom the appellant had now formed a relationship.

5. He referred to the respondent's conclusion that the appellant had formed his new relationship in an attempt to circumvent the Immigration Rules. It was not accepted that he and his partner were in a genuine and subsisting relationship.

6. The FtJ stated that the appellant's immigration history called for very close scrutiny. He noted the appellant claimed that he paid £2,000 for the false passport with which he entered the UK in 2006, the false passport thereafter being disposed of by the appellant. He said that the first verified date of the appellant's presence in the UK was that of his religious marriage to his first wife [FC] on 18 November 2012. She originated from Bangladesh but was by the time of the marriage a naturalised British citizen.

7. The FtJ said that on 16 May 2013 the appellant applied for leave to remain on the basis of that relationship. The application was refused. Although the appellant requested a reconsideration of that decision, by the time of the further refusal on 19 September 2013, the appellant and [FC] married in a civil ceremony. On 28 November 2013 the appellant made further submissions, but those were rejected on 4 December 2013.

8. Next the FtJ referred to the fact of the appellant's arrest on 21 November 2014 when he was found to be working illegally. He was served with a notice of liability to removal. At [7] he said that the application dated 2 December 2014 made no mention of the person said to be his new partner, [SA], a woman born in Bangladesh but naturalised as a British citizen. He referred to the fact that she has two children by her husband, the children having been born on [ ] 2009 and [ ] 2011. They were both born in the UK and at the date of the hearing were aged 7 and 5, respectively.

9. At [8], the FtJ said that in an accompanying letter dated 2 December 2014, reference was made to an application made only four months earlier by the appellant, to remain on the basis of his relationship with his previous wife ([FC]). The solicitors had apparently explained that the appellant was then in the process of finalising his

divorce. His new partner was referred to, although not by name, and it was erroneously stated that she had three children.

10. At [9] the FtJ referred to the appellant having informed the respondent on 15 January 2015 that he was nearly divorced from his first wife and intended to marry his new partner. They married on 11 June 2015. The respondent's decision, which is the subject of the appeal, was made on 8 July 2015.

11. The FtJ set out the main features of the appellant and his current wife's evidence, in terms of the witness statements and their oral evidence. He noted the contention that they had been living together for some time and were in a genuine and subsisting relationship. The evidence was that the appellant was attached to his wife's children and looked after them as if they were his own. He also noted the evidence that his wife has learning disabilities and the appellant had provided a social worker's report confirming that he was her main carer.

12. The appellant's evidence was that as she was dependent on him for support, he could not leave her behind if he was forced to leave the UK, and it would not be reasonable to expect her to uproot herself to accompany him. It was further said that she would not receive the help and support that she has in the UK, if she moved to Bangladesh.

13. In relation to the children, the evidence was that they had now started school and it would be harsh on them to relocate, so it was said. The appellant's case was that he had no strong family ties in Bangladesh and he has a circle of friends in the UK.

14. The FtJ referred to a letter from the appellant's wife's GP which was to the effect that not only does the appellant's wife have learning disabilities, but also one of the children does. The FtJ referred to "evidence from school and social workers" that the appellant was good with the children, who currently had only indirect contact with their biological father while an assessment was being carried out.

15. At [15] one finds the FtJ's express conclusions. He said that the appellant's personal circumstances and history do not suggest a capacity for a sustained relationship, and he has not shown that his current relationship is any more stable than his previous relationships. He said that the appellant had married his current wife without waiting for approval from the respondent. He said that he was satisfied that his haste was occasioned by his wish to obtain an immigration status to which he was otherwise not entitled because of his very poor immigration history. His history showed, the FtJ said, that he has done whatever he could in an effort to avoid removal.

16. In the same paragraph he said that whilst he accepted that he has shared some of his wife's parental responsibilities towards her children, he was not satisfied that he had shown that he has a deep and lasting relationship with them. Neither she nor the children have to leave the UK if he is removed and any help that they require is help they are entitled to in the United Kingdom.

17. The FtJ concluded that the appellant could not satisfy the requirements of Appendix FM, under either the parent or partner route. He said that he gave little weight to the private life that he had developed in the UK, with reference to paragraph 276ADE of the Rules.

18. Finally, he concluded that there were no exceptional circumstances warranting consideration of Article 8 outside the Rules, but in any event the public interest in maintaining fair but firm immigration (control) outweighed such rights as he may possess, in any assessment of proportionality.

The grounds and submissions

19. The grounds contend that the FtJ's conclusions were irrational in terms of the suggestion that the appellant's relationship is unstable simply because he has had previous failed relationships. The grounds refer to evidence said to support the contention that there was a genuine and subsisting relationship, namely that they had married in 2013 and have accrued four years of marriage, that he is the primary carer for his wife because of her learning difficulties, that he is stepfather to her two children who barely have contact with their biological father, and that they have continued to reside together since their marriage.

20. It is asserted that the fact that the appellant had had "two" previously unsuccessful relationships was not a sufficient reason to disregard his current relationship.

21. Furthermore, it would be unreasonable to expect the appellant's partner to leave the UK, given her British citizen status, her family and private life here, the fact that she has learning difficulties, as does one of her children, and that both children have contact with their father, albeit not often. Removing them would prevent their relationship from continuing.

22. The grounds contend that the children are qualifying children and rely upon the care provided both by the appellant and their mother. Reference is also made in the grounds to the best interests of the children, with the overarching contention being that the appellant's Article 8 rights were not properly considered, in terms of his parental relationship with two qualifying children and his genuine and subsisting relationship with a partner.

23. In submissions on behalf of the appellant the grounds were relied on. It was submitted that there was no proper consideration of s.117B(6) of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act"). The FtJ had made speculative findings at [15]. I was referred to the decision in *R (On the application of RK) v Secretary of State for the Home Department (s.117B(6); "parental relationship") IJR* [2016] UKUT 0031, in terms of the extent to which a person who is not a biological parent can be one who nevertheless has a parental relationship with a child, for the purposes of s.117B(6).

24. It was further submitted that the FtJ's conclusion that the appellant does not have a "deep and lasting relationship" with the children, is perverse in the light of the

evidence. It is also inconsistent with the FtJ having concluded in the same sentence that the appellant shared some of his wife's parental responsibilities with the children.

25. I was referred to evidence in the appellant's bundle as to the appellant's relationship with the children, that evidence being from children's services, the school, the GP and a Children In Need plan.

26. In terms of the respondent's 'rule 24' response, the FtJ had not made any finding in relation to the requirement for the appellant to leave the UK and make an application for entry clearance. Furthermore, any such consideration would need to take into account the effect of temporary separation on the appellant's wife and her children. It was submitted that the decision of the Supreme Court in *Agyarko v Secretary of State for the Home Department* [2017] UKSC 11 dilutes the import of the decision in *Chen v Secretary of State for the Home Department (Appendix FM – Chikwamba – temporary separation – proportionality)* IJR [2015] UKUT 00189 (IAC).

27. Ms Aboni relied on the rule 24 response that is to the effect that it was open to the FtJ to conclude that given the appellant's appalling immigration history, he had not shown that his current relationship is any more (stable) than his previous relationships.

28. Furthermore, it was open to the appellant to seek entry clearance to the UK on the basis of his relationship with his current partner. No evidence had been produced to show that his current partner's children would be detrimentally affected by temporary separation. A further point is made about the precariousness of the appellant's family life.

29. It was accepted that a parental relationship can exist where a person is not the biological parent. Here, the FtJ had accepted that there was some involvement by the appellant with the children, but the FtJ doubted the appellant's motives. It was open to him to find that it was not intended that this was a permanent relationship. He was entitled to find that there was no genuine and subsisting relationship with the children. Accordingly, s.117B(6) had no application.

30. Although the issue of making an application for entry clearance from Bangladesh was not raised at the hearing, that was nevertheless an option for the appellant.

31. In reply, Mr Gajjar submitted that if the FtJ intended to find that there was no genuine and subsisting relationship with the children, more would need to have been said than was said at [15]. The fact of previous relationships was not indicative of a lack of a present genuine relationship with his wife and children. The FtJ had not gone so far as to say it was not a genuine and subsisting relationship.

Conclusions

32. Insofar as it is asserted that the FtJ failed to take into account the documentary evidence of the appellant's involvement with his current wife's two children, any

such complaint has no merit. The FtJ gave a detailed summary of the witness statements of the appellant and his wife and referred at [10] to a social worker's report. At [13] he referred to a letter from the appellant's wife's GP, and in the same paragraph to evidence from the children's school and social workers. He noted that that evidence indicated that the appellant is involved with the children. He was aware of, and referred to, evidence that not only the appellant's wife, but one of the children, had a learning disability.

33. At [15] he said that he accepted that the appellant has shared some of his wife's parental responsibilities towards the children. In other words, the FtJ was aware of the evidence of the appellant's involvement with his wife's children, and what was said about his relationship with them.

34. I do not accept that there is any inconsistency in [15] of the FtJ's decision in the following sentence:

> "While I accept that he has shared some of his wife's parental responsibilities towards her children, I am not satisfied that he has shown that he has a deep and lasting relationship with them."

35. There is no inconsistency between the FtJ accepting that the appellant has shared some of his wife's parental responsibilities towards the children, and his nevertheless concluding that the appellant had not shown that he has a deep and lasting relationship with them. The one does not necessarily follow from the other.

36. The grounds of appeal in relation to the FtJ's decision cite a number of factors which it is said suggest that the FtJ was wrong to conclude that the appellant and his wife are not in a genuine and subsisting relationship. One of those factors is said to be that they married in 2013 and have accrued four years of marriage. However, that is not a correct statement of fact. Both the appellant and his wife say in their witness statements that they registered their marriage on 11 June 2015. The appellant married his first wife on 24 July 2013, according to the marriage certificate in the respondent's bundle. The decree nisi in relation to the appellant's first marriage with [FC] is dated 2 January 2015. The appellant's present wife's decree nisi in relation to her marriage to her first husband is dated 16 August 2013. The appellant and his present wife were not therefore married in 2013 and had not, as the grounds suggest, had four years of marriage at the time of the hearing before the FtJ, or indeed even until now. The respondent's decision also refers to the marriage as having taken place on 11 June 2015.

37. Furthermore, and related to the duration of the appellant's present marriage, the FtJ referred to a letter from the appellant's representatives dated 2 December 2014 which refers to an application made not four months earlier for leave to remain on the basis of his relationship with his first wife. This is a further indication that at that time, as late as August 2014, the appellant and his present wife were not together.

38. In addition, the FtJ also noted at [8] of his decision, that that letter dated 2 December 2014 referred to the appellant being in the process of finalising his divorce, with

reference being made in the letter to the appellant having a new partner, his current wife, who was also going through a divorce and who has three children. She is not named in the letter, as the FtJ pointed out, and the letter erroneously states that she has three children. Indeed, when one looks at the application which accompanied that letter, being an application for leave to remain on Article 8 grounds, and dated the same date as the letter, 2 December 2014, there is no reference to the appellant having a partner in the UK or any dependants. The application at section 2 of the form is on the basis of private life in the UK. At section 3 he states that there are no dependants applying with him.

39. It is apparent therefore, that as at the date of the hearing before the FtJ, the appellant's marriage to his present wife had only subsisted for about 18 months. Although it is said in the letter from the representatives dated 2 December 2014 that the appellant is in a relationship with his (unnamed) current partner, even accepting that there was a relationship at that date, it was still a relatively recent event in terms of an assessment of its genuine and subsisting nature.

40. At [15] the FtJ said that the appellant's personal circumstances and history do not suggest a capacity for a sustained relationship. It may be that a judgement about the appellant's capacity for a sustained relationship, as a statement of fact, is premature. Nevertheless, the point that the FtJ was plainly making was that the appellant had not established that he was in a committed relationship with his current wife, or that he was committed to the children either. That is the whole import of what he said at [15] about the appellant's relationship with his wife and her children.

41. It is not the case, as the grounds and submissions suggest, that the FtJ concluded that simply because the appellant had previously been divorced, or had been in a relationship that only endured for a short time, this meant that his current relationship was not genuine or subsisting. There was much more depth to the FtJ's decision than that. One sees that relatively early on in the FtJ's decision, where at [4] he said that the appellant's immigration history called for very close scrutiny. He then set out that history. At [15] he said that he married his current wife without waiting for approval from the respondent, and he concluded that his haste was occasioned by his wish to obtain an immigration status to which he was not otherwise entitled, because of his very poor immigration history. It is undoubtedly the case that he does have a very poor immigration history. He was arrested whilst working in November 2014 and served with a notice of liability to removal. Less than a month later the appellant's representatives wrote to the respondent stating that he had a new British citizen partner (his current wife), the letter to which I have previously referred.

42. The FtJ was entitled to conclude that the appellant's actions have been in an effort to avoid his removal.

43. Furthermore, it is evident that the appellant and his current wife did not start living together, in their own accommodation at least, until about November 2016, a month before the hearing before the FtJ. So much is clear from the letters in the appellant's

bundle that was before the FtJ. For example, the CIN Network Meeting report dated 21 September 2016 on page 1 states that the appellant's wife had recently, at that time, been successful on bidding for a two-bedroom property and that she and the children are due to move in as soon as the electricity and water supply had been sorted out. The letter from Children's Social Work Services, dated 10 November 2016 states that until recently the appellant had not lived in the family home and had resided with his brother in London, the reason being stated as that his wife and her children have been living with her brother and his family in a three-bedroom property. Therefore, the suggestion in the appellant and his wife's witness statements stating that they had been living together for "some time" as at the date of their witness statements in December 2016 cannot be accurate.

44. In all these circumstances, the FtJ was entitled to conclude that the appellant had not established that he has shown "a deep and lasting relationship" with the appellant's wife's children, or indeed that his current relationship was a stable one. In those circumstances, the appellant had not established that he had a "genuine and subsisting parental relationship" with a qualifying child, either under the Rules, or for the purposes of s.117B(6) of the 2002 Act.

45. The FtJ having without legal error concluded that the appellant could not meet the requirements of the Rules in any respect, and that there were no exceptional circumstances warranting consideration of Article 8 outside the Rules, he was bound to dismiss the appeal.

Decision

The decision of the First-tier Tribunal did not involve the making of an error on a point of law. Its decision to dismiss the appeal therefore stands.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Because this decision refers to children, unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Upper Tribunal Judge Kopieczek 10/01/18