Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/06652/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 6th March 2018	**On 5th April 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE GRIMES

Between

MSUR
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr S Tauhid, Hubers Law Solicitors
For the Respondent: Mr D Clarke, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant, a national of Bangladesh, appealed to the First-tier Tribunal against a decision of the Secretary of State dated 16th September 2015 to refuse his application for leave to remain in the UK on the basis of his private and family life. First-tier Tribunal Judge Robinson dismissed the Appellant's appeal in a decision promulgated on 21st June 2017. The Appellant now appeals to this Tribunal with permission granted by First-tier Tribunal Judge Osborne. I note that First-tier Tribunal Judge Osborne originally granted permission to appeal on 22nd December

2017 but the permission decision erroneously noted that permission was refused. That was amended on 17th January 2018.

2. The background to this appeal is that the Appellant entered the UK on 27th August 2011 with entry clearance as a Tier 4 (General) Student valid until 31st October 2013. On 2nd July 2013 he submitted an application for leave to remain as a Tier 4 (General) Student and that application was refused on 9th January 2014. He made an application for leave to remain on the basis of his private and family life on 8th July 2015 and the refusal of that application of 16th September 2015 is the subject of this appeal. At the time of the application the Appellant was in a relationship with his partner, Ms G, whom he met on 1st July 2013. His partner is a part-time teacher and suffers from a number of disabilities. She has two children, who reside part-time with her and part-time with their father.

3. The First-tier Tribunal Judge considered the appeal at paragraphs 29 to 41 of the decision. The judge considered the provisions of Section 117B of the Nationality, Immigration and Asylum Act 2002. The judge noted the date of the application for leave to remain, which was made on 4th June 2015, and noted that it is apparent from the evidence that the Appellant and his partner had not been living together as partners for two years at the time the application was made. The judge made a number of findings in relation to the Appellant and his partner and the children and considered the best interests of the children. The judge found at paragraph 40 that the Appellant "is a step parent without parental responsibility" for the two children, whose main carer is their father although the children's mother shares the care of the children when they stay overnight at her home at least twice a week. The judge noted that the Appellant takes an active part in the children's care but he is not their main father figure and although he plays an important role in the children's lives he "does not have a parental relationship with a "qualifying child"" [41]. The judge accepted that there are insurmountable obstacles to family life with Ms G continuing outside of the UK but considered that there is no reason that the Appellant could not apply to the British High Commission for entry clearance as a partner [43]. The judge considered that an application for entry clearance may involve a temporary absence between the Appellant and his partner but that this would not lead to permanent family upheaval [45]. The judge took into account the Appellant's immigration history and concluded that this is not a case where there are compelling reasons for considering the Appellant's situation outside the Rules [47]. The judge concluded that no special elements had been presented in support of an Article 8 claim outside the Rules which suggest that the decision is disproportionate [48].

Error of Law

4. Two Grounds of Appeal are put forward. The first ground contends that the judge failed to give adequate reasons for the variation of grounds. It is contended that under Section 120 of the Nationality, Immigration and Asylum Act 2002 as amended by the Immigration Act 2014 the judge had jurisdiction to hear all issues of the appeal in one hearing. It is contended that the judge erred in disregarding the fact that, by the time of the hearing, the Appellant and the Sponsor had lived together for over

two years. It is contended that the judge erred under Section 85(4) of the Nationality, Immigration and Asylum Act 2002.

5. At the hearing Mr Clarke submitted that at paragraph 30 the judge noted that it was apparent from the evidence that the Appellant and his partner had not been living together as partners for two years at the date of the application. In his submission the grounds conflate the Immigration Rules and Article 8. I have some difficulty with this submission. Mr Tauhid accepted that the judge's conclusion at paragraph 30 was correct under the Rules but he submitted that the judge should have considered new evidence in relation to the fact that the relationship had been ongoing for a period of two years by the date of the hearing. This was an appeal on the basis that the decision was not in accordance with the Immigration Rules or in accordance with the European Convention on Human Rights. The appeal could not succeed under the Immigration Rules because, as accepted by the Appellant, he had not demonstrated that his partner was a "partner" within GEN.1.2 of Appendix FM of the Immigration Rules, which states:

> "GEN.1.2. For the purposes of this Appendix "partner" means-
>
> (i) the applicant's spouse;
>
> (ii) the applicant's civil partner;
>
> (iii) the applicant's fiancé(e) or proposed civil partner; or
>
> (iv) a person who has been living together with the applicant in a relationship akin to a marriage or civil partnership for at least two years prior to the date of application, unless a different meaning of partner applies elsewhere in this Appendix."

6. Accordingly this appeal could only succeed under Article 8. To this extent the Appellant has not established that there is any error at paragraph 30 where the judge noted that the Appellant and his partner had not been living together for two years at the date of the application. In any event it is clear from reading the decision as a whole that the judge was aware of the length of the relationship at the date of the hearing but did not consider that this was a weighty factor in considering proportionality [46-47].

7. In essence it is contended in this ground that the judge arguably failed to consider the appeal under Article 8 outside the Immigration Rules taking into account the current circumstances. Mr Clarke accepted for the purposes of Article 8 that the judge could take into account the circumstances at the date of the hearing. On first reading it may appear that the judge failed to consider the current circumstances from paragraphs 47 and 48 where he considered that there were no compelling reasons for considering the situation outside the Rules and that no special elements had been presented in support of an Article 8 claim outside the Rules.

8. However, it is my view that paragraphs 47 and 48 do not disclose any material error. This is because, although the judge said that he was not considering the appeal under Article 8 outside the Immigration Rules, that is exactly what he did do at paragraphs 29 to 48. As this was an appeal under the Immigration Rules and Article 8 (because it

was lodged in September 2015), it would perhaps have been helpful had the judge considered the Immigration Rules and then Article 8 in the form of an assessment under **R v SSHD ex parte Razgar [2004] UKHL 27**. However, this is not a material error because the judge did consider all relevant factors.

9. The judge clearly accepted that there was family life between the Appellant and his partner and his partner's children. This is apparent, for example, at paragraphs 40, 41 and 43. The judge took into account the fact that the Appellant could not meet the requirements of the Immigration Rules, which is apparent from paragraph 30. In considering proportionality the factors to be taken into account are those set out at Section 117B of the Nationality, Immigration and Asylum Act 2002, which the judge rehearsed at paragraph 29 and took into account at paragraphs 30 to 33. The judge considered that the Appellant speaks English and that he built up a private and family life with his partner at a time when his immigration status was precarious. The judge took into account that the Appellant was not able to work lawfully in the UK and that he is dependent on his partner. He took into account the fact that his partner is working and is in receipt of disability living allowance and that she receives care support from Social Services. He took into account the partner's medical conditions [32]. The judge took into account that the Appellant's partner is able to support herself financially. The judge also took into account the fact that the partner shares parental responsibility for the two children with her former partner. The judge went on to identify at paragraph 38 that he had to consider proportionality. In considering proportionality the judge looked at the best interests of the children, identifying relevant factors at paragraph 39. At paragraph 40 the judge considered the issue of a parental responsibility and parental relationship. The judge found that the Appellant is a step parent without parental responsibility for the children and that the father is the main carer [40]. The judge found that the Appellant plays an active part in the children's care and he supports his partner and has an important part of play in the children's lives. However, the judge concluded that the Appellant does not have a parental relationship with a qualifying child [41].

10. Again, in considering proportionality, the judge took into account factors put forward by the Respondent at paragraph 42. The judge looked at paragraph 43 at the family life claim and considered that there are insurmountable obstacles to family life with the Sponsor continuing outside the UK. The judge went on at paragraphs 43, 44 and 45 to consider the impact of a temporary absence on their relationship and the judge found at paragraph 46 that the Appellant did not provide evidence that he has any strong social or community ties outside the family home. Further, at paragraph 47 the judge specifically took into account that the Appellant and his partner were in a relationship for three years at the date of hearing. So, whilst the judge indicated at paragraphs 47 and 48 that he was not conducting a freestanding Article 8 assessment it is very clear that that is what he actually did. There were all relevant factors in a proportionality assessment and all taken into account properly by the judge.

11. It is contended in the second ground that the judge erred in failing to apply the correct assessment of the material facts. The judge accepted that the Appellant has a parental relationship with the qualifying children at paragraph 40 but it is asserted

that the judge erred in also seeking parental responsibility. Reliance is placed on the case of **R (on the application of RK) v Secretary of State for the Home Department (s.117B(6); "parental relationship" (IJR) [2016] UKUT 31**. Reliance is placed on the head note where the Tribunal said that it is not necessary for an individual to have parental responsibility in law for there to exist a parental relationship. It is further contended that the judge accepted that there are insurmountable obstacles to continuing family life in the UK but reliance is placed on the decision of **Agyarko and Another [2017] UKSC 11** where at paragraph 51 the Supreme Court stated:

> "51. Whether the applicant is in the UK unlawfully, or is entitled to remain in the UK only temporarily, however, the significance of this consideration depends on what the outcome of immigration control might otherwise be. For example, if an applicant would otherwise be automatically deported as a foreign criminal, then the weight of the public interest in his or her removal will generally be very considerable. If, on the other hand, an applicant - even if residing in the UK unlawfully - was otherwise certain to be granted leave to enter, at least if an application were made from outside the UK, then there might be no public interest in his or her removal. The point is illustrated by the decision in *Chikwamba v Secretary of State for the Home Department*."

12. The grounds of appeal contend that the judge erred in relation to the findings as to parental responsibility and parental relationship. In the case of **R (on the application of RK)** the Tribunal summarised its conclusions in the head note as follows:

> "1. It is not necessary for an individual to have "parental responsibility" in law for there to exist a parental relationship.
>
> 2. Whether a person who is not a biological parent is in a "parental relationship" with a child for the purposes of s.117B(6) of the Nationality, Immigration and Asylum Act 2002 depends on the individual circumstances and whether the role that individual plays establishes he or she has "stepped into the shoes" of a parent.
>
> 3. Applying that approach, apart from the situation of split families where relationships between parents have broken down and an actual or de facto step-parent exists, it will be unusual, but not impossible, for more than 2 individuals to have a "parental relationship" with a child. However, the relationships between a child and professional or voluntary carers or family friends are not "parental relationships"."

13. It is clear from this guidance that it is important to consider the particular facts of the case to establish whether a person is in a parental relationship with a qualifying child. The judge did that at paragraphs 40 and 41. The judge concluded that the Appellant did not have a parental relationship with the children. At the hearing before me Mr Tauhid was unable to direct me to any evidence before the First-tier Tribunal as to the relationship between the Appellant and the children. He pointed to evidence from the Appellant's bundle at pages 78 to 84. However, this evidence from the school and a psychologist in relation to the children makes no reference to the Appellant. There is also a letter from the Sponsor's ex-husband, who refers to the Appellant having a role in relation to looking after the children. The Appellant also dealt with this issue in his witness statement.

14. In my view, it was open to the judge on the basis of this evidence to conclude that the Appellant did not have a "parental relationship" with the children. The judge did not require the Appellant to demonstrate parental responsibility but instead he assessed the evidence and reached the conclusion that the evidence did not demonstrate a parental relationship. This was open to the judge on the evidence.

15. It is further contended in the Grounds of Appeal that the judge erred in failing to consider the guidance from the Supreme Court in **Agyarko** at paragraph 51. Mr Clarke referred to the decisions in **R (on the application of Chen) v SSHD (Appendix FM – Chikwamba – temporary separation – proportionality) (IJR) [2015] UKUT 00189 (IAC)**. He submitted that the correct approach is that set out at paragraph 39 of that decision where the Tribunal said:

> "In my judgment, if it is shown by an individual (the burden being upon him or her) that an application for entry clearance from abroad would be granted and that there would be significant interference with family life by temporary removal, the weight to be accorded to the formal requirement of obtaining entry clearance is reduced. In cases involving children, where removal would interfere with the child's enjoyment of family life with one or other of his or her parents whilst entry clearance is obtained, it will be easier to show that the balance on proportionality falls in favour of the claimant than in cases which do not involve children but where removal interferes with family life between parties who knowingly entered into the relationship in the knowledge that family life was being established whilst the immigration status of one party was 'precarious'. In other words, in the former case, it would be easier to show that the individual's circumstances fall within the minority envisaged by the House of Lords in **Huang** or the exceptions referred to in judgments of the ECtHR than in the latter case. However, it all depends on the facts."

16. Mr Clarke also referred to the decision in **Hayat (nature of Chikwamba principle) Pakistan [2011] UKUT 00444 (IAC)** and to paragraphs 23 and 24 where the Tribunal emphasised that the decision in **Chikwamba** made plain that where the only matter weighing on the Respondent's side of the balance is the public policy of requiring a person to apply under the Rules from abroad that legitimate objective will usually be outweighed by factors resting on the Appellant's side of the balance and that the **Chikwamba** principle does not automatically trump anything on the State's side, such as a poor immigration history. I further note that at paragraph 51 of **Agyarko** the Supreme Court said that where an applicant was "otherwise certain" to be granted leave to enter if an application were made from outside the UK, then "there might be no public interest in his or her removal".

17. What is clear from the guidance in all three of these cases is that the matter comes down to a proportionality assessment considering all of the facts in the case. This is exactly what the judge has done in this case. The judge took into account the Appellant's relationship with his partner and the relationship with the children. It is clear that the judge attached particular weight to the fact that the children's lives would not be disrupted by a temporary absence by the Appellant. This was a relevant consideration in assessing whether there would be significant interference

with family life by temporary removal. The judge considered all relevant factors in making this assessment.

18. I note that the grounds do not assert that the decision of the First-tier Tribunal Judge was perverse. There is no allegation either that the judge failed to take anything into account. In my view, it is clear, looking at the decision as a whole, that the judge considered all relevant factors. The judge did conduct a proper assessment under Article 8 accepting that there was family life between the parties, considering the best interests of the children, considering the factors in Section 117B of the 2002 Act and considering proportionality. In these circumstances it is clear to me that the judge reached a decision open to him on the evidence.

Notice of Decision

The First-tier Tribunal Judge did not make any material error of law in his assessment of the appeal.

The decision of the First-tier Tribunal Judge shall stand.

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

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 their 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.

Signed Date: 28th March 2018

Deputy Upper Tribunal Judge Grimes

TO THE RESPONDENT
FEE AWARD

The appeal has been dismissed and there can be no fee award.

Signed Date: 28th March 2018

Deputy Upper Tribunal Judge Grimes