



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/33652/2015

THE IMMIGRATION ACTS

Heard at Field House
On 1 June 2018

Decision Promulgated
On 19 June 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE SYMES

Between

GAZI [R]
(ANONYMITY ORDER NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondents

Representation:

For the Appellant: Mr S Mustafa (for Kalam Solicitors)
For the Respondent: Mr E Tufan (Home Office Presenting Officer)

DECISION AND REASONS

1. This is the appeal of Gazi [R], a citizen of Bangladesh born 3 March 1982, against the decision of the First-tier Tribunal of 13 March 2017 dismissing his appeal against the refusal of his human rights claim.
2. The immigration history provided by the Respondent sets out that the Appellant entered the country as a visitor on 14 December 2010 with leave until 29 May 2011; he

subsequently overstayed, next coming to the Home Office's attention via an application of 24 July 2015 on the basis of his family circumstances here.

3. The Appellant's application was based on being the partner of his Sponsor [SA], a British citizen of Bangladeshi origin. Ms [A] had a son, [N], born 25 October 2007 from a former relationship with a British citizen. She had divorced her former spouse on 18 October 2013. Their relationship began on 16 February 2015, the date of their Islamic marriage. [N] lived with the Sponsor and the Appellant in a nuclear family unit.
4. The application was refused on the basis that the genuineness of the relationship was contested as it had not lasted long, and in any event they had cohabited for less than two years such that the "partner" definition was not satisfied; furthermore the Appellant did not qualify as a "parent" under Immigration Rule 6 as the natural father was still alive and there had been no formal adoption. The Home Office did not accept there were any exceptional circumstances calling for the grant of leave.
5. The First-tier Tribunal recorded further evidence given before it. [N] saw his biological father, who lived in Cardiff, twice a month on Sundays, generally taking up around an hour of the potential three hours allotted to those sessions. They spent half of the school holidays together too. The Sponsor suffered a miscarriage in June 2015 and was now undergoing fertility investigations at Birmingham Women's hospital. It could be seen that the Appellant played a role in [N]'s life, and he and the Sponsor described it as close, given they lived together in the same family unit, the Appellant playing games and sport with him and the evidence from the boy's school confirming that the Appellant regularly collected him.
6. The First-tier Tribunal accepted the historical facts asserted by the Appellant and Sponsor. However, it dismissed the appeal, on the basis that
 - (a) The partner route was not satisfied absent two years' cohabitation at the application date;
 - (b) The parent route was not satisfied as the Appellant lacked sole parental responsibility for the child, and fell foul of the exclusion of a "partner" sharing caring responsibilities for the child from the necessary eligibility requirements;
 - (c) As to the Appellant's private life under the Rules, he would not face very significant obstacles to integration in Bangladesh given his family connections there;
 - (d) As to private and family life outside the Rules, the Appellant's residence was precarious and his English language skills were presumably limited given he used an interpreter; critically, having regard to section 117B(6) of the NIAA 2002, the Appellant could not establish that he had a "genuine and subsisting parental relationship with a qualifying child" given that whilst he helped with the boy's

daily care, the natural father retained a strong paternal interest by exercising his access rights and it could not be said that the Appellant had stepped into his shoes;

(e) Acknowledging the best interests of the British citizen child as being to remain in the UK with the Sponsor and able to pursue the court-ordered contact with his natural father, the Appellant and Sponsor could maintain their relationship by modern means of communication and regular visits, perhaps making use of the time that the boy spent with his natural father to make extended visits to Bangladesh.

7. Grounds of appeal alleged that the First-tier Tribunal had materially erred in law because:

(a) The Appellant and Sponsor had contracted a civil marriage on 6 November 2015 and thus the Appellant had satisfied the definition of “partner” for Appendix FM purposes at the date of the hearing below;

(b) There was no evidence to support the conclusion that the Appellant had not stepped into the natural father’s shoes: the latter only saw the Appellant twice monthly and for occasional spells in the school holidays.

8. Permission to appeal was granted by the First-tier Tribunal on 5 February on the basis that it was arguable that a stepfather might have stepped into the shoes of the natural father sufficiently for them to have a parental relationship with a child. The permission grant ruled out the arguability of the point on “parent”.

9. Before me Mr Tufan accepted that the First-tier Tribunal had been wrong both on the ground on which permission to appeal had been granted, but in fact also in its approach to the post-decision but pre-hearing marriage: the latter was a matter that could be taken into account at the date of hearing. Mr Mustafa did not demur from that analysis. Both agreed that a re-hearing before the First-tier Tribunal would be appropriate.

Findings and reasons

10. The Immigration Rules set out:

“Section E-LTRPT: Eligibility for limited leave to remain as a parent

E-LTRPT.1.1. To qualify for limited leave to remain as a parent all of the requirements of paragraphs E-LTRPT.2.2. to 5.2. must be met.

Relationship requirements

E-LTRPT.2.2. The child of the applicant must be-

(a) under the age of 18 years at the date of application, or where the child has turned 18 years of age since the applicant was first granted entry clearance or leave to remain as a parent under this Appendix, must not have formed an independent family unit or be leading an independent life;

(b) living in the UK; and

- (c) a British Citizen or settled in the UK; or
- (d) has lived in the UK continuously for at least the 7 years immediately preceding the date of application and paragraph EX.1. applies.

E-LTRPT.2.3. Either-

- (a) the applicant must have sole parental responsibility for the child or the child normally lives with the applicant and not their other parent (who is a British Citizen or settled in the UK), and the applicant must not be eligible to apply for leave to remain as a partner under this Appendix; or
- (b) the parent or carer with whom the child normally lives must be-
 - (i) a British Citizen in the UK or settled in the UK;
 - (ii) not the partner of the applicant (which here includes a person who has been in a relationship with the applicant for less than two years prior to the date of application); and
 - (iii) the applicant must not be eligible to apply for leave to remain as a partner under this Appendix.

E-LTRPT.2.4.

- (a) The applicant must provide evidence that they have either-
 - (i) sole parental responsibility for the child, or that the child normally lives with them; or
 - (ii) direct access (in person) to the child, as agreed with the parent or carer with whom the child normally lives or as ordered by a court in the UK; and
- (b) The applicant must provide evidence that they are taking, and intend to continue to take, an active role in the child's upbringing.

...

Section EX: Exceptions to certain eligibility requirements for leave to remain as a partner or parent

EX.1. This paragraph applies if

- (a)
 - (i) the applicant has a genuine and subsisting parental relationship with a child who-
 - (aa) is under the age of 18 years, or was under the age of 18 years when the applicant was first granted leave on the basis that this paragraph applied;
 - (bb) is in the UK;
 - (cc) is a British Citizen or has lived in the UK continuously for at least the 7 years immediately preceding the date of application; and
 - (ii) taking into account their best interests as a primary consideration, it would not be reasonable to expect the child to leave the UK;"

11. The Tribunal concluded in *RK* [2016] UKUT 31 (IAC) §35 that:

"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".

12. In *RK* the Tribunal went on to cite this Guidance from the Home Office Immigration Directorate Instructions:

“In considering whether the applicant has a 'genuine and subsisting parental relationship' the following factors are likely to be relevant:

Does the applicant have a parental relationship with the child?

- what is the relationship - biological, adopted, step child, legal guardian? Are they the child's de facto primary carer?
- is the applicant willing and able to look after the child?
- are they physically able to care for the child?

Unless there were very exceptional circumstances, we would generally expect that only two people could be in a parental relationship with the child.

Is it a genuine and subsisting relationship?

- does the child live with the person?
- where does the applicant live in relation to the child?
- how regularly do they see one another?
- are there any relevant court orders governing access to the child?
- is there any evidence provided within the application as to the views of the child, other family members or social work or other relevant professionals?
- to what extent is the applicant making an active contribution to the child's life?

Factors which might prompt closer scrutiny include :

- the person has little or no contact with the child or contact is irregular;
 - any contact is only recent in nature;
 - support is only financial in nature; there is no contact or emotional support;
- and/or
- the child is largely independent of the person.”

13. Also in *RK* the Upper Tribunal stated §45:

“It is not necessary to consider more fully the position of a step-parent or partner of the primary carer of a child when a family has split after separation or divorce of the parents. That is not this case. That situation may, depending upon the circumstances, present a persuasive factual matrix for there to be a "third parent". The respondent's guidance differentiates between situations where the non-residential biological parent plays no (or no meaningful) continuing role in the child's life and where he or she does. In the latter situation, it is said that the step-parent or new partner would be unlikely to have a "parental relationship". Whilst each case will be fact sensitive, I do not inevitably see the virtue of the argument (other than as a numerical limitation of parents to no more than two) which

excludes a step-parent or partner in this latter situation from being in a "parental relationship" if that is the substance of the relationship even where the non-residential biological parent continues to play some role. The issue will be fact sensitive and is best worked out in a case where it properly arises for decision."

14. Although both the structure and syntax of the Immigration Rules are at times obscure regarding the intricacies of the "parent" and partner" routes, their general scheme is reasonably clear. An applicant who has a relationship with a qualifying child may rely on that relationship either in the context of a viable *partner* application, or under the *parent* route. Such a relationship is a significant advantage in the course of analysing a human rights appeal, because the question then becomes one as to whether the child's relocation abroad would be reasonable. However, under the Rules in Appendix FM, a person who *can* qualify under the partner route is in general *excluded* under the parent route.
15. Once an assessment is made *outside* the Rules under section 117B(6) of NIAA 2002, in relation to a relationship for a person who has a genuine parental relationship with such a child, there is no limitation barring a parent who is also the child's other carer's partner from consideration. As stated by Elias LJ in *MA (Pakistan)* [2016] EWCA Civ 705 §46:

"Even on the approach of the Secretary of State, the fact that a child has been here for seven years must be given significant weight when carrying out the proportionality exercise. Indeed, the Secretary of State published guidance in August 2015 in the form of Immigration Directorate Instructions entitled "Family Life (as a partner or parent) and Private Life: 10 Year Routes" in which it is expressly stated that once the seven years' residence requirement is satisfied, there need to be "strong reasons" for refusing leave (para. 11.2.4). These instructions were not in force when the cases now subject to appeal were determined, but in my view they merely confirm what is implicit in adopting a policy of this nature. After such a period of time the child will have put down roots and developed social, cultural and educational links in the UK such that it is likely to be highly disruptive if the child is required to leave the UK. That may be less so when the children are very young because the focus of their lives will be on their families, but the disruption becomes more serious as they get older. Moreover, in these cases there must be a very strong expectation that the child's best interests will be to remain in the UK with his parents as part of a family unit, and that must rank as a primary consideration in the proportionality assessment."

16. In this appeal the Appellant had been treated as not qualifying for consideration under the Ex.1 exception because he was not a "partner" as relevantly defined, for want of cohabitation, his Islamic marriage not being accepted as constituting a valid one in English law. However, once a civil marriage was contracted, the Appellant did indeed qualify under the partner route.
17. The change in the nature of the parties' relationship was not excluded from consideration by the First-tier Tribunal as an impermissible "new matter". Section 85(4) of the Nationality Immigration and Asylum Act 2002 allows the Tribunal to "consider

any matter which it thinks relevant to the substance of the decision, including a matter arising after the date of the decision". Under section 85(5), consent is required from the Respondent to consider a "new matter", and new matters are defined as those not previously considered by the Secretary of State in the decision against which the appeal is brought.

18. Here of course the relationship of Appellant and Sponsor had formed the very basis of the application to the Home Office giving rise to this appeal, and thus developments in that relationship were admissible under the general toleration of post-decision evidence without falling foul of the "new matter" proviso. Indeed as the relevant Home Office guidance states, "something [is] unlikely to be a new matter" where

"... a human rights claim is based on a relationship which the SSHD has considered and the couple have now married, [this] is additional evidence relating to the original claim [and] not a new matter".

19. Accordingly the First-tier Tribunal erred in law in failing to accept that the Appellant was a partner and therefore qualified for consideration under the Appendix FM route for that class of individual. Once within that route, the question arose as to whether or not "*the applicant has a genuine and subsisting parental relationship*" with a qualifying child: clearly the level of involvement in the child's life established by a cohabiting stepfather who regularly plays with the child and helps facilitate their access to school *potentially* passes that test. *RK* expressly posits the possibility that more than two parents might have a relevant "parental relationship", particularly where there is a stepparent involved.
20. Given this was the central question on the appeal, I accordingly find a material error of law in the decision of the First-tier Tribunal. The appeal must be re-heard.

Decision:

The decision of the First-tier Tribunal contains a material error of law.
The appeal is remitted for hearing afresh.



Signed:
Deputy Upper Tribunal Judge Symes

Date: 11 June 2018