Tribunals Service
Asylum and Immigration Tribunal

Upper Tribunal (Immigration and Asylum Chamber) **Appeal Number: HU/09197/2018**

THE IMMIGRATION ACTS

Heard at Bradford	**Decision & Reasons Promulgated**
On 5 April 2019	**On 8 May 2019**

Before

UPPER TRIBUNAL JUDGE HEMINGWAY

Between

UP
(ANONYMITY DIRECTED)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mrs A Chaudhry (Counsel)
For the Respondent: Mr M Diwnycz (Senior Home Office Presenting Officer)

DECISION AND REASONS

1. This is the claimant's appeal to the Upper Tribunal, brought with the permission of a Judge of the First-tier Tribunal, from a decision of the First-tier Tribunal (the tribunal) which it made on 9 October 2018, following a hearing of 22 June 2018, and which it sent to the parties on 22 October 2018. The tribunal, in making its decision, dismissed the claimant's appeal from the Secretary of State's decision of 4 April 2018, refusing to grant him leave to remain in the United Kingdom (UK) as the spouse of his British citizen sponsor.

2. The tribunal granted the claimant anonymity because it thought it should do so to protect the welfare and privacy of two infant children who have an involvement in the case. Nothing was said to me about anonymity but I find myself in agreement with the tribunal about the matter and have, therefore, decided to continue that grant.

3. Shorn of all the essentials, the background circumstances may be summarised as follows: The claimant is a national of Turkey and he was born on 22 January 1994. His sponsor, a British citizen, has two children from a previous relationship who were aged ten and seven years respectively at the

time the tribunal heard the appeal. The sponsor and the claimant met each other, in Turkey, in May 2014. They subsequently married in Turkey on 7 July 2016. It had been intended at one point that the couple and the two children would all live together as a single family unit in Turkey. However, there were complications with those plans linked at least in part to the wishes of the father of the two children to continue to have regular contact with them. There was in existence an Order of the Family Court placing a qualified prohibition upon the children's removal abroad. On 11 November 2016 the claimant entered the UK as a visitor. That leave was due to expire on 6 April 2017 but on 25 March 2017 he made the application which ultimately led to the appeal before the tribunal and now to this appeal before the Upper Tribunal.

4. The claimant attended the hearing before the tribunal at which both parties were represented. Both he and the sponsor gave oral evidence. Part of his case was his assertion that if permitted to remain in the UK he would have employment. A person said to be his intended employer attended before the tribunal but did not give evidence.

5. The tribunal decided that the claimant could not benefit from the potentially relevant Immigration Rules contained within Appendix FM because he had been a visitor at the time of his application. That followed from E-LTRP.2.1 and has not been in issue. The tribunal asked itself whether the claimant could bring himself within paragraph 276ADE of the Rules but decided that he could not. It then went on to consider whether he might succeed under Article 8 of the ECHR outside the rules. As to that, it reminded itself of the content of sections 117B and 117D of the Nationality, Immigration and Asylum Act 2002.

6. The tribunal then turned its attention to what it made of the evidence. As to the claimed relationship between the claimant and the sponsor's two children it said it accepted that "there is now a genuine bond of affection between him and the children and that he participates in their day to day care". At a later point in its written reasons it said that it was satisfied that the claimant, the sponsor and the sponsor's two children enjoy family life for the purposes of Article 8. It referred to the evidence regarding the claimant's prospective employment in the UK but was unconvinced about the genuineness of the claimed job offer, observing that the potential employer's evidence had not been tested in cross-examination. Ultimately, it decided that the order of the Family Court did not absolutely prohibit the children going to Turkey, that family life could reasonably be enjoyed outside the UK, that the best interests of the children would be for them to reside with their mother wherever that might be, and that, putting everything together, any interference with Article 8 rights would be proportionate. That is why it dismissed the appeal.

7. An application for permission to appeal to the Upper Tribunal followed. A plethora of points were taken in the grounds of appeal and permission to appeal, on an unlimited basis was granted. That led to a hearing before the Upper Tribunal (before me) so that consideration could be given as to whether the tribunal had erred in law and, if so, what should flow from that. Representation at that hearing was as indicated above and I am grateful to each representative.

8. Although not persuaded by all of the points made in the grounds of appeal, I have concluded that the tribunal, notwithstanding its careful analysis of the evidence, did err in law in a way which was material in the sense that, had it not so erred, the outcome might (I do not say would) have been different. I shall now explain why I have reached that view.

9. Section 117B of the Nationality, Immigration and Asylum Act 2002 relevantly provides:

"117B Article 8: Public interest considerations applicable in all cases

> (1) The maintenance of effective immigration controls is in the public interest…
>
> (6) In the case of a person who is not liable to deportation, the public interest does not require the person's removal where –
>
> (a) the person has a genuine and subsisting parental relationship with a qualifying child, and
>
> (b) it would not be reasonable to expect the child to leave the United Kingdom."

10. Section 117D of the same Act relevantly provides that a qualifying child is a person under the age of eighteen who is British or who has lived in the UK for a continuous period of seven years.

11. The tribunal clearly thought that there was a close relationship between the claimant and the two children. That followed from what it had said about the relationship which I have noted above. But, on my reading, it did not actually make a finding as to whether it could be said that the claimant had a genuine and subsisting parental relationship with them as that term is used in section 117B above. That was a matter of potential importance because had it been decided that there was such a relationship it would only have been in circumstances where it was reasonable to expect the children to leave the UK that the appeal would fail.

12. It may be that the tribunal in saying what it did regarding the relationship between the claimant and the children was intending to find that there was such a genuine and subsisting parental relationship. But I think if it was making such a finding it would have said so in a way which was clear and unequivocal. That is particularly so given that, on the evidence, the children's natural father remained in the UK, remained concerned about their welfare and location and remained a part of their lives. It might be said that the tribunal can be assumed not to have been intending to make such a finding because of the existence of the father such that there was no room, in the circumstances, for a third parent. But in *R (on the application of RK v SSHD IJR* [2016] UKUT 00031 (IAC) it was said that it would be unusual, but not impossible, for more than two individuals to have a "parental relationship" with a qualifying child. It is not recorded in the tribunal's written reasons whether it was specifically argued, in terms, that this was a case where there were effectively three parents (including a de facto parent) but such was argued in a skeleton argument which had been provided to the tribunal by the claimant's representatives. Since it would be unusual to have more than two "parents" I could not have faulted the tribunal at all for not considering the possibility for itself if the point had not bene put to it. But notwithstanding that it appears it might not have been put to it during the course of the hearing, the point was clearly put in the skeleton argument so, in my judgment, the tribunal had to make a finding about the matter. I have concluded that it did not do so, or at least, it did not clearly do so.

13. The tribunal said, at paragraph 31 of its written reasons, that an important consideration for it was whether "family life can reasonably be enjoyed outside the United Kingdom". It then embarked upon an assessment as to that noting, amongst other things, that the claimant and the sponsor had originally planned for the family, including the children, to relocate to Turkey and that the best interest of the children would simply be served by them residing with their mother. I have considered whether all of that amounted to an assessment under section 117B(6)(b) as to whether it would or would not be reasonable to expect the children to leave the UK. But it seems to me that such an assessment as to reasonableness is wider, as well as being more specifically targeted upon the children, than a more general assessment as to whether family life can reasonably be enjoyed outside the UK. Further, a best interests assessment is not necessarily the same and would not necessarily yield the same result as a reasonableness of departure test. Of course, had the tribunal found that there was no genuine and subsisting parental relationship between the claimant and the

children it would not have had to ask itself the question regarding the reasonableness or otherwise of the children leaving the UK. But on my reading, it is not clear that it did so find.

14. So, in my judgment, the tribunal notwithstanding its careful and thorough approach failed to make appropriate findings under section 117(6)(a) and (assuming a positive finding regarding parental relationship) under 117(6)(b). I have concluded, therefore, that its decision has to be set aside.

15. I was originally minded to keep the case in the Upper Tribunal for the purposes of remaking. But I have changed my mind as to that. There was another issue raised in the grounds of appeal regarding the tribunal's treatment of the evidence concerning the job offer. Specifically, it was said that the prospective employer had not only attended the hearing but had been tendered for cross-examination but that the Secretary of State's representative had declined to cross examine. In such circumstances, ran the argument on behalf of the claimant, it had not open to the tribunal to dismiss the evidence of the job offer on the basis that the letter written by the prospective employer had not been the subject of cross-examination. I have not found it necessary to reach a view as to that ground of appeal, given the view I have reached about the one which I have already analysed above, but it may be that, ultimately, a view or a finding will have to be reached as to the evidence of prospective employment (thought I do not think it is by any means the most pivotal aspect of this appeal) as well as findings regarding the precise nature of the relationship between the claimant and the qualifying children. If there is to be extensive fact-finding it does seem to me, on reflection, that this is something that is best done by the First-tier Tribunal as the expert fact-finding body in the field. I have concluded, therefore, that the appropriate course is remittal.

16. So, there will be a complete rehearing of the claimant's appeal before a differently constituted First-tier Tribunal. The rehearing will not be limited to the basis upon which I have set aside the tribunal's decision. All matters of fact and law will be considered, at the rehearing, entirely afresh.

17. Since I am remitting I am statutorily required to give directions for the rehearing. But it does not seem to me that I need to be unnecessarily prescriptive as to that. Accordingly, I would simply direct that the appeal be considered entirely afresh, by way of an oral hearing, before a differently constituted First-tier Tribunal. Any other incidental directions will, no doubt, be made by a Judge of the First-tier Tribunal in due course.

18. This appeal to the Upper Tribunal then succeeds on the basis and to the extent explained above.

Decision

The decision of the First-tier Tribunal involved the making of an error of law. Accordingly, that decision is set aside and the case is remitted for a complete rehearing before a differently constituted First-tier Tribunal.

The First-tier Tribunal granted the claimant anonymity. I continue that grant for the same reasons that it was made. I do so under rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008. Accordingly, no report of these proceedings shall name or otherwise identify the claimant or any member of his family nor the sponsor or any members of her family. This applies to all parties to the proceedings. Failure to comply may lead to contempt of court proceedings.

Signed: Dated: 2 May 2019

Upper Tribunal Judge Hemingway