Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/10671/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 24 January 2019	**On 4 March 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAMBERLAIN

Between

EOO
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr. A. Adewole, A & A Solicitors
For the Respondent: Ms. K. Pal, Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal by the Appellant against a decision of First-tier Tribunal Judge Khawar, promulgated on 3 September 2018, in which he dismissed the Appellant's appeal against the Respondent's decision to allow further leave to remain on human rights grounds.

2. Given the involvement of a child, I have made an anonymity direction.

3. Permission to appeal was granted as follows:

> "It is arguable that the Judge has not set out a full analysis of the scope of the available evidence in relation to the question of whether there is a genuine and subsisting parental relationship. It is arguable that a fuller analysis was required in the context of analysing reasonableness in relation to the question of the child's return. The Judge noted that there was in fact no evidence in relation to the Appellant's daughter's status in the United Kingdom. The Judge noted the only documentary evidence filed by the Appellant was a letter from her daughter's school dated 25th June 2018. Further material in this context is identified in the permission application. The Judge refers at paragraph 33 of the decision to the correspondence of 29th September 2017 and 9th June 2014. The Judge found that this correspondence did not establish or corroborate the Appellant's assertions of regular contact with her daughter. It is arguable that findings were required in the context of the existence of a parental relationship. It is further arguable that a holistic assessment of the evidence in this context including the evidence of the photographs referred to in the permission application was required. It is arguable that an insufficient analysis has been set out in relation to the question of the reasonableness of the child's return. The Judge noted at paragraph 36 that there was in fact no evidence in relation to the Appellant's daughter's status in the United Kingdom. The child had been given leave."

4. The Appellant attended the hearing. I heard submissions from both representatives following which I reserved my decision.

Error of Law

5. The Judge finds at [28]:

> "Having carefully considered all documentary and oral evidence, I find the Appellant has failed to discharge the burden of proof upon her to establish she has any regular contact with her daughter, Janet (aforesaid) who is now said to (sic) 17 years of age and who has lived with the Appellant's "step father" since, allegedly 2004 (according to the Appellant's oral evidence)."

6. The Judge then went on to consider the oral evidence of the Appellant's daughter spending weekends and holiday periods with the Appellant and Sponsor. The Judge finds that there is no evidence of these arrangements "other than assertions", and states: "For the reasons set out below I do not find the Appellant and Sponsor credible in relation to such assertions".

7. At [30] he finds that the Appellant made no mention of her daughter's existence in her application form. At [31] he finds that there is no mention of her daughter in the solicitor's covering letter. There is no error in these findings. The application was made on the basis of the Appellant's relationship with the Sponsor.

8. At [32] the Judge states:

> "It is evident that the Appellant has only sought to rely upon her daughter's presence in the United Kingdom as a result of the Respondent's RFRL which notes that the Appellant has a child in the United Kingdom, whose primary carer is another individual. As a result the Appellant now asserts that she sees her

> daughter regularly and that her daughter "needs" the Appellant to be settled in the United Kingdom."

9. This is not correct. The reasons for refusal letter is dated 24 August 2017. At F5 of the Respondent's bundle is a letter from the Appellant's solicitors to the Respondent. It states:

> "We write further with reference to your letter of 5th June 2017 (copy enclosed) requesting additional information on our above client's application as a spouse. [….]
>
> As regards to the second issue relating to her daughter, Miss JOO, she has obtained a letter from her College, Saint Gabriel College, Langton Road, London, SW9 6UL and it has been enclosed here for your attention."

10. At G1 of the Respondent's bundle is a letter from the Appellant's daughter's school dated 13 June 2017, which refers to the Appellant attending appointments and parents evenings, and being listed as the first contact person for emergencies.

11. I find that the Appellant did not seek to rely on her daughter's presence solely as a result of the reasons for refusal letter. Although the Appellant's daughter was not referred to in the application form, evidence of her having entered the United Kingdom with the Appellant was provided with the application. In the Appellant's passport is a copy of the visa issued to the Appellant and her daughter (B11). The Respondent was aware of the Appellant's daughter from the documents provided with the application if not from the application form itself. It was the Respondent who made further enquiries regarding the Appellant's daughter, and the letter at G1 was provided in response to the Respondent's request. The Judge does not refer to this letter in the decision.

12. At [33] the Judge states:

> "The only documentary evidence filed by the Appellant is a letter from her daughter's school, dated 25th June 2018, which declares that the Appellant is "listed on our system as mother and we can confirm that the [Appellant] has contact and dealings with the school if needed". This clearly does not establish that the Appellant's daughter stays with the Appellant during weekends and/or school holidays. Similarly, letter dated 29th September 2017 and 9th June 2014 (pages 45-46 AB), do not establish/corroborate the Appellant's assertions that she has regular contact with her daughter."

13. At [34] the Judge considers the oral evidence of the Appellant's daughter staying with the Appellant and Sponsor. At [35] he finds "most significantly" that there is no evidence from the Appellant's daughter or the Appellant's stepfather. At [36] he finds:

> "Therefore, on the totality of the above evidence/considerations I am not satisfied that the Appellant has established that she meets the criteria under Appendix FM EX.1 in relation to her daughter. In this regard I note that there is in fact no evidence in relation to the Appellant's daughter's status in the United Kingdom, other than the particulars provided with the Respondent's RFLR (sic).

> Therefore, on the totality of the evidence before me the Appellant's appeal also fails under the parent route under Appendix FM".

14. Although the Judge refers to consideration of the parent route [36], as the Appellant was eligible to apply under the partner route, this was the relevant route to be considered under the rules. The Appellant's daughter was relevant under the partner route, with reference to paragraph EX.1(a). Under paragraph EX.1(a), the Appellant had to show that she had a genuine and subsisting parental relationship with her daughter. Although the Judge states that he has considered the totality of the evidence, I find that he has failed to consider the evidence in the round. He has focused on the Appellant's assertion that she spends weekends and holiday periods with her daughter and, in focusing on this, has failed properly to consider the evidence which was before him. While the letters from the school do not corroborate the evidence that the Appellant's daughter stays with the Appellant at weekends, the Judge has failed properly to consider what these letters do show.

15. The issue was whether the Appellant had a genuine and subsisting parental relationship with her daughter, and I find that the Judge failed properly to consider the evidence before him which went to this issue. He drew an adverse inference from his finding that the Appellant only relied on her daughter's presence after her application had been refused, which was not the case. It is clear from evidence in the Respondent's bundle that there had been correspondence regarding the Appellant's daughter prior to the Respondent's decision.

16. I accept that there was no evidence before the Judge from the Appellant's daughter, but this does not detract from the failure to consider the evidence which was provided. The letters from the school, both prior to and after the decision, show that the Appellant is involved in her daughter's education. The letter at page 45 indicates that it is the Appellant's mother who had made an application for her daughter to have free school meals. There is a further letter at page 46 from the school addressed to the Appellant and to Mr. Osho regarding her daughter's progress. The school stated that the Appellant was listed as the primary emergency contact for her daughter. Ms. Pal submitted that this was only for the school's administration purposes, as they had to have a primary contact for the Appellant's daughter, but I do not find it to be so limited. The correspondence also shows that there is a genuine engagement by the Appellant with her daughter's education.

17. The Judge also failed to consider the photographic evidence provided which showed the Appellant together with her daughter. There is no consideration of these photographs.

18. I find that the Judge failed properly to consider the evidence which was before him of the relationship of the Appellant and her daughter. The fact that the Appellant's daughter lives with the Appellant's "father" does not rule out a genuine parental relationship with the Appellant.

19. The Judge states that there is no evidence that the Appellant's daughter has any status in the United Kingdom, other than the particulars provided with the reasons

for refusal letter. The reasons for refusal letter states that the Appellant's daughter had leave to remain in the United Kingdom until November 2017. It also indicated that the Appellant's daughter had been in the United Kingdom since 2004. Therefore she was a "qualifying child" for the purposes of paragraph EX.1(a)/ section 117B(6).

20. Taking all of the above into account, I find that the Judge has failed to consider the totality of the evidence and has failed to consider properly whether this evidence showed that the Appellant had a genuine and subsisting parental relationship with her daughter.

Remaking

21. As agreed at the hearing, I remake the decision on the basis of the evidence which was before the First-tier Tribunal, and I admit the evidence provided for the appeal before me, an application having been made under rule 15(2)(a). I have taken into account the evidence contained in the Appellant's bundle provided for the First-tier Tribunal (50 pages), the Appellant's supplementary bundle (38 pages), and the Respondent's bundle (to L17).

22. As set out above, the Respondent considered the Appellant's application under the partner route, not the parent route, as the Appellant was eligible to apply as a partner. I adopt the finding made in the First-tier Tribunal that the Appellant is in a genuine and subsisting relationship with the Sponsor, which the Respondent did not accept. There was no cross-appeal against this finding. I therefore find that I can proceed to consider whether paragraph EX.1(a) applies.

23. The Appellant's daughter was born on 15 April 2001 and, as at the date of the hearing before me, is 17 years old. She has been here since 2004. I find that she has a residence permit with leave to remain until 17 October 2020. She previously had a residence permit valid until 13 November 2017. I therefore find that she is under 18, is in the UK, and has lived in the UK continuously for at least the seven years immediately preceding the date of application. I have considered whether the evidence shows that the Appellant has a genuine and subsisting parental relationship with her daughter.

24. The Appellant's daughter has provided a letter (pages 17 and 18 of the supplementary bundle). She states that she has a "great relationship" and "excellent communication" with her mother. She states that they are able to "discuss anything" and are able to "laugh and be silly". She states that the Appellant gives her motherly advice.

25. The Appellant has provided a further letter from her daughter's school which confirms that the Appellant is listed as her daughter's mother and has contact with the school (page 19 of the supplementary bundle). Letters on pages 14 and 20 from the school are addressed both to Mr. Osho and to the Appellant. These relate to setting up a ParentPay account for the Appellant's daughter, and to the school prom. I have referred above to the evidence which was before the First-tier Tribunal from

the Appellant's daughter's school, and I find that this is further evidence of the Appellant's involvement with her daughter's education.

26. The Appellant has provided further photographs of her with her daughter (pages 34 to 38 of the supplementary bundle).

27. The Appellant states in her witness statement that she arrived in the United Kingdom with her daughter [14]. Her daughter lives with the Appellant's "father", Mr. Osho, but stays with the Appellant and Sponsor at the weekend and during school holidays [15]. At weekends they attend the same church [16]. The Appellant's evidence regarding her daughter staying with her was not found credible in the First-tier Tribunal owing to the lack of accommodation.

28. However, I find that even if the Appellant's daughter does not stay with her every weekend and during school holidays, this is not necessary to show a genuine and subsisting parental relationship. The evidence before me from the Appellant's daughter and from her school shows that the Appellant has regular and frequent contact with her daughter, and is involved with her daughter's upbringing and education.

29. I do not adopt the findings of the First-tier Tribunal that the Appellant has no meaningful contact with her daughter. The letter from her daughter indicates that their contact is meaningful, and that they have a genuine mother/daughter relationship.

30. I have considered the case of SR (subsisting parental relationship –section 117B(6)) Pakistan [2018] UKUT 334 (IAC) provided by the Appellant's representative in relation to the establishment of a parental relationship. This concerns situations where a parent is unable to demonstrate that he or she has been taking an active role in a child's upbringing. However, I find in this case that the Appellant has shown that she has been taking an active role in her daughter's upbringing, otherwise she would not have any contact with the school, and the school would not be aware of her existence. I find that the Appellant plays an active role in her child's upbringing.

31. I find that the Appellant brought her daughter to the United Kingdom. The fact that she is not living with her now does not diminish the fact that they still have an ongoing parental relationship. Her daughter is still a child and is not living an independent life. She has contact with the Appellant on a regular basis. The Appellant has not abdicated her role as a mother, as can be seen from the evidence provided. I find that the evidence shows that the Appellant has a genuine and subsisting parental relationship with her daughter.

32. I have therefore considered whether it is reasonable to expect the Appellant's daughter to leave the UK, taking into account her best interests. I find that she has been in the United Kingdom since 2004. She was three years old when she arrived. She is now 17. She has been here for 14 years. She is in her final year at school studying for her A levels. She has received all of her education in the United

Kingdom. She is now approaching a crucial stage of her education, the culmination of 14 years' study. She has leave to remain in the United Kingdom.

33. In these circumstances, I find that it would not be in the Appellant's daughter's best interests to leave the United Kingdom given her age, the amount of time she has been in the United Kingdom and the stage which her education has reached. I further find that it would not be reasonable for her to leave the United Kingdom, given that she would have to abandon her education at a crucial point, and return to a country where she has not been for 14 years. She has spent her formative childhood years in the United Kingdom, and has permission to be here.

34. I therefore find that the Appellant has shown that paragraph EX.1(a) applies as it is not reasonable to expect her daughter, with whom she has a genuine and subsisting parental relationship, to leave the United Kingdom. I therefore find that she meets the requirements of the immigration rules.

Article 8

35. I have considered the Appellant's appeal under Article 8 in accordance with the case of Razgar [2004] UKHL 27. I find that the Appellant has a family life with her daughter sufficient to engage the operation of Article 8. I find that she has a relationship with the Sponsor sufficient to engage the operation of Article 8. She has been in the United Kingdom now for some 14 years and I find that she has a private life sufficient to engage the operation of Article 8. I find that the decision would interfere with her family and private life.

36. Continuing the steps set out in Razgar, I find that the proposed interference would be in accordance with the law, as being a regular immigration decision taken by UKBA in accordance with the immigration rules. In terms of proportionality, the Tribunal has to strike a fair balance between the rights of the individual and the interests of the community. The public interest in this case is the preservation of orderly and fair immigration control in the interests of all citizens. Maintaining the integrity of the immigration rules is self-evidently a very important public interest. In practice, this will usually trump the qualified rights of the individual, unless the level of interference is very significant. I find that in this case, the level of interference would be significant and that it would not be proportionate.

37. I have taken into account all of my findings above. In assessing the public interest I have taken into account section 19 of the Nationality, Immigration and Asylum Act 2002. Section 117B(1) provides that the maintenance of effective immigration controls is in the public interest. I have found above that the Appellant meets the requirements of paragraph EX.1(a) of the immigration rules. I therefore find that there will be no compromise to the maintenance of effective immigration control by allowing her appeal.

38. I find that the Appellant speaks English (section 117B(2)). In the decision of the First-tier Tribunal, it was found that the Sponsor's income for the previous year was £17,904, below that required to sponsor a spouse under the immigration rules

(117B(3)). The Sponsor is still employed, and the evidence provided in the supplementary bundle shows that he earned £17,952.46 in the tax year ending March 2018 (page 24). While I accept that this is below the financial threshold, it is not far below. There is no evidence that the Appellant is in receipt of any benefits.

39. Little weight is to be given to a private life established either when leave was precarious, or when an appellant was in the United Kingdom unlawfully (sections 117B(4) and (5)). However, these sections do not apply to family life.

40. Section 117B(6) provides that 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". This reflects the position as set out in paragraph EX.1(a). I have found above that the Appellant meets the requirements of paragraph EX.1(a). The Appellant's daughter is a qualifying child, and for the reasons set out above, I therefore find that section 117B(6) applies. The public interest does not require the Appellant's removal.

Decision

41. The decision of the First-tier Tribunal involves the making of a material error of law and I set the decision aside.

42. I remake the decision allowing the Appellant's appeal on human rights grounds. The Appellant meets the requirements of Appendix FM.

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 her or any member of her 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 1 March 2019

Deputy Upper Tribunal Judge Chamberlain

TO THE RESPONDENT
FEE AWARD

As I have allowed the appeal and because a fee has been paid or is payable, I have considered making a fee award. Further evidence was provided for the appeal. In the circumstances I make no fee award.

Signed Date 1 March 2019

Deputy Upper Tribunal Judge Chamberlain