Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/10307/2018

THE IMMIGRATION ACTS

Heard at Birmingham
On 20th December 2019

Decision & Reasons Promulgated
On 12th February 2020

Before

UPPER TRIBUNAL JUDGE MANDALIA

Between

ADEEL RIAZ
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr M Hoare, H & S Legal
For the Respondent: Ms. H Aboni, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a national of Pakistan. He arrived in the United Kingdom in January 2010 with entry clearance as a student valid until 28 February 2011. He was granted further leave to remain as a student until 23 October 2011. On 22 October 2011 he made and in time application for further leave to remain as a student. That application was refused by the respondent and an appeal against that decision was dismissed by the First tier Tribunal on 22 February 2012. The applicant remained in the

© CROWN COPYRIGHT 2020

UK unlawfully. Although the applicant made a further application for leave to remain as a student, that application was refused in June 2012 and did not attract a right of appeal. Following a lengthy period of inactivity, on 6th November 2017, the appellant made an application for leave to remain in the UK on the basis of his family and private life with his partner Hannah Candice, and her child from a previous relationship. The application was refused by the respondent for reasons set out in a decision dated 25 April 2018.

2. The appellant's appeal against that decision was dismissed for reasons set out in the decision of First-tier Tribunal Judge Parkes promulgated on 19 December 2018. In reaching his decision the Judge considered the evidence given by the appellant and his partner that is summarised at paragraphs [9] and [10] of the decision. The Judge's findings and conclusions are set out at paragraphs [11] to [23] of the decision.

3. It is uncontroversial that the appellant entered the United Kingdom with entry clearance as a student but remained in the UK unlawfully, after the FtT dismissed is appeal in February 2012. It was also uncontroversial that the appellant cannot satisfy the requirements for leave to remain in the UK on the basis of family and private life as set out in Appendix FM and paragraph 276ADE of the immigration rules.

4. The appellant relied upon s117B(6) of the Nationality, Immigration and Asylum Act 2002 in support of his claim that the decision to refuse his application for leave to remain is in breach of his right to respect for private and family life under Article 8. He claimed that the public interest does not require his removal because he has a genuine and subsisting parental relationship with a qualifying child, that is, a person under the age of 18 who is a British citizen, and it would not be reasonable to expect the child to leave the United Kingdom. At paragraphs [18] and [19] of his decision, the judge stated:

> "18. The problem that arises is that the appeal has to be considered in line with Article 8 and the overall circumstances. It may be unreasonable to expect a child to leave the UK but that does not

address the underlying circumstances. In this case the appellant is playing a paternal role but has been doing so for less than a year in circumstances where he remains in the UK illegally (unless and until an appeal succeeds) and has no expectation of being permitted to remain where his partner is entitled to remain and I find will remain. The situation is to be assessed not on a hypothetical basis as paragraphs 18 and 19 *(sic)* of KO make clear but on the situation that exists.

19. Even being the parent of a child entitled to remain in the UK does not answer the question that arises under article 8, a child is not a bypass to the immigration rules. In assessing a child's best interests the circumstances themselves have to be considered and while the child is not to be blamed for the actions of the parent or parents their behaviour or the behaviour of one of them may be relevant in assessing proportionality. Ordinarily it is considered to be in a child's best interest to live with both parents in a stable caring environment but that has already ceased to be the case to be replaced by the current arrangements and there is no guarantee that those will endure either. Given the fairly short period of time that the appellant has been involved in the child's life the evidence does not show that he can be said to have established a parental relationship that engages the rules or that his presence is particularly significant to the extent that his departure would be contrary to the child's best interests."

5. At paragraph [21], the judge stated:

"The current arrangements between the appellant and sponsor are not sufficiently durable to meet the requirements of the immigration rules. Taking that as a guide I find that while the appellant plays a parental role in some aspects of the sponsor's son's life it would be going too far to say that he has a parental relationship within the meaning of the immigration rules or the guidance that applies."

The appeal before me

6. The appellant claims in the grounds of appeal that the respondent does not deny that the appellant is in a subsisting relationship with his partner's child, who has no relationship with his birth father. It is said that in considering whether the appellant has a genuine and subsisting parental relationship with the child, the respondent's published guidance recognises that a 'parental relationship' goes beyond the strict definition of parent set out in paragraph 6 of the immigration rules. The guidance recognises that an applicant living with a child of their partner and taking a step-parent role in the child's life could have a "genuine and subsisting parental relationship", even if that person had not formally adopted the child and if the other biological parent played some part in the child's

life. The appellant claims the First-tier Tribunal Judge accepts that the appellant plays a parental role and that it may be unreasonable to expect the child to leave the UK, but erroneously proceeds upon the premise that the reality is that the 'sponsor's' child will not be required to leave the UK, and can remain with his mother with whom he clearly has the stronger relationship. The appellant claims the judge failed to answer the question that arises when considering whether the public interest requires the appellant's removal under s117B(6). That is, whether it would be reasonable to expect the child to leave the United Kingdom.

7. The appellant claims the decision also contains a mistake as to fact. The appellant claims the judge concluded that the oral evidence of the appellant's partner was that she and her son would not leave the UK. It is said the appellant was not asked in cross-examination whether she would leave the UK. In her witness statement she had said that if the appellant could not remain, she and her son would have to leave with him, but they have no experience of life in another country, speak no languages other than English and her son would lose contact with his schoolfriends and would have his education disrupted. Her evidence was that it would not be in her son's best interests to expect him to leave the United Kingdom.

8. Permission to appeal was granted by First-tier Tribunal Judge Keane on 22 February 2019. It was noted the judge, arguably, did not consider or make findings as to whether it would be reasonable to expect the child to leave the United Kingdom as required by s117B(6) of the 2002 Act.

9. Before me, Mr Hoare submits the judge accepts the appellant plays a parental role in the life of his partner's child and that it may be unreasonable to expect the child to leave the UK. The judge then erroneously focuses upon whether the child will in fact leave the UK without addressing the question whether it would be reasonable to expect the child to leave the UK. I referred Mr Hoare to the language used by the judge in paragraph [18] of his decision. The judge noted the claim that the appellant is playing a 'paternal' role in the child's life but

has been doing so for less than a year. Mr Hoare submits the judge does not properly direct his mind to the test as to whether the appellant has a genuine and subsisting parental relationship with the child and there is no thorough analysis of the issue. The judge found that the appellant plays a paternal role, and Mr Hoare submits, that must be a parental relationship. Mr Hoare submits the decision does not properly address the framework of the rules and the legislation.

10. In reply, Ms Aboni submits the judge gave adequate reasons for dismissing the appeal. She submits that at paragraph [21], the judge states that while the appellant plays a parental role in some aspects of the sponsor's sons' life, it would be going too far to say that he has a parental relationship. She submits that having rejected the appellant's claim that he has a genuine and subsisting parental relationship with a qualifying child, it was open to the judge to dismiss the appeal for the reasons set out in the decision.

Discussion

11. The only ground of appeal available to the appellant was that the respondent's decision is unlawful under s 6 of the Human Rights Act 1998. In reaching his decision, the judge had regard to the explanations provided by the appellant regarding his immigration history, and the fact the appellant had remained in the UK unlawfully since March 2012. The Judge found the appellant cannot meet the requirements of the immigration rules, and Mr Hoare does not challenge that conclusion.

12. The core issue in the appeal was whether the decision to refuse the appellant leave to remain is a justified or a disproportionate interference with the right to respect for family life. In that context, Courts and Tribunals must have regard in particular to the matters set out in Part 5A of the Nationality, Immigration and Asylum Act 2002, as amended by the Immigration Act 2014.

13. The Court of Appeal confirmed in SSHD -v- AB (Jamaica) & Another [2019] EWCA Civ 661 that for the purposes of s117B(6) of the 2002 Act, the public interest does not require a person's removal where that person has a genuine and subsisting parental relationship with a child and it would not be reasonable to expect the child to leave the United Kingdom. Whether there was such a parental relationship depends on the individual circumstances of the case, and it is not a requirement of s.117B(6) for there to be a realistic prospect of the child leaving the UK as a consequence of the person's removal.

14. I have carefully considered the witness statements and evidence that was before the First-tier Tribunal. The appellant simply claims that he has developed a deep bond of affection with his partners child who has no contact with his birth father. He claims to play a "paternal role in his life" and states "Since January 2016 I take him out regularly, to school, tuition classes, swimming classes and GP appointments.". That is confirmed in the witness statements of the appellant's partner. In her second witness statement the appellant's partner refers to the child's admission to hospital in July 2016, during which the child was greatly comforted by the appellant's presence. The headteacher of the school attended by the child confirms that the appellant is known to the school as a 'significant adult' in the life of the child.

15. I accept a person can have a genuine and subsisting parental relationship with a child of their partner, but the determination of that issue turns upon the particular facts of the case. In SR (subsisting parental relationship – s117B(6)), the appellant was the biological parent of a child and was found to have a genuine and subsisting parental relationship with his child even though he had not been taking an active part in his upbringing, and only saw the child for 3 hours every two weeks.

16. Here, the First-tier Tribunal judge did not accept the appellant has a genuine and subsisting parental relationship with his partner's child. That is clear from a careful reading of the decision as a whole and a

careful reading of paragraphs [18] and [21] of the decision. At [18], the judge noted it may be unreasonable to expect a child to leave the UK but that does not address the underlying circumstances. The judge states, *".. in this case the appellant is playing a paternal role but has been doing so for less than a year in circumstances where remains in the UK illegally…".* The use of the words 'paternal role' is taken from the witness statement of the appellant an in my judgment, demonstrates the judge considering the part played by the appellant in the life of his partner's son. However, at paragraph [21], the judge states that *".. while the appellant plays a parental role in some aspects of the sponsor's son's life, it would be going too far to say that he has a parental relationship …".* When read as a whole, it is clear in my judgement that the judge was not satisfied that the appellant has a genuine and subsisting parental relationship with a qualifying child. That was relevant to the judge's Article 8 proportionality assessment and having reached that conclusion it was open to the Judge to dismiss the appeal. The question therefore whether it would be reasonable to expect the child to leave the United Kingdom did not arise. Any error in the Judge's approach to that second question, or the evidence that was before the Tribunal, is in the circumstances immaterial.

17. The decision of the First tier Tribunal Judge is not as well-structured or well-expressed as it might be, but to identify an error of law based on inadequate reasoning or consideration, there has to be more than a general literary criticism. Although "error of law" is widely defined, it is not the case that the UT is entitled to find an error of law simply because it does not agree with the decision, or because the Tribunal thinks the decision could be more clearly expressed or another judge can produce a better one. Baroness Hale put it in this way in AH (Sudan) v SSHD at [30]:

> "Appellate courts should not rush to find such misdirection simply because they might have reached a different conclusion on the facts or expressed themselves differently."

18. It follows that in my judgement there is no material error of law in the decision of the First-tier Tribunal Judge and the appeal is dismissed.

Notice of Decision

19. The appeal is dismissed, and the decision of First-tier Tribunal Judge Parkes shall stand.

Signed Date 20th January 2020

Upper Tribunal Judge Mandalia