Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/17415/2019 P

THE IMMIGRATION ACTS

Decided under Rule 34 without a hearing on 27 August 2020

Decision & Reasons Promulgated On 7 September 2020

Before:

UPPER TRIBUNAL JUDGE GILL

Between

The Secretary of State for the Home Department Appellant

And

Piyushkumar Ravjibhai Patel Respondent

(ANONYMITY ORDER NOT MADE)

This is a decision on the papers without a hearing. On behalf of the Secretary of State, it was confirmed that a decision could appropriately be made on the papers. The respondent objected and requested an oral hearing. The documents described at para 4 below were submitted. A face-to-face hearing or a remote hearing was not held for the reasons given at paras 6-18 below. The order made is set out at para 43 below. *(Administrative Instruction No. 2 from the Senior President of Tribunals).*

Representation (by written submissions):

For the appellant: Mr Z Jafferji, of Counsel instructed by London Imperial Immigration Services.

For the respondent: Mr D Clarke, Senior Presenting Officer.

DECISION AND DIRECTIONS

1. The Secretary of State appeals against a decision of Judge of the First-tier Tribunal Rothwell who, in a decision promulgated on 2 January 2020 following a hearing on 20 December 2019, allowed the appeal of Mr Patel, a national of India born on 10 March 1963 (hereafter the "claimant") on human rights grounds (Article 8) against a decision of the Secretary of State of 15 October 2019 to refuse leave to remain on human rights grounds after having considered his application of 2 October 2019 for leave to remain under the 10-year parent route of the Immigration Rules.

2. Permission to appeal was granted by the First-tier Tribunal ("FtT") in a decision signed on 31 March 2020 and sent to the parties on 28 May 2020.

3. On 22 June 2020, the Upper Tribunal sent to the parties a "*Note and Directions*" issued by Upper Tribunal Judge Lindsley dated 12 June 2020. Para 1 of the "*Note and Directions*" stated that, in light of the need to take precautions against the spread of Covid-19, Judge Lindsley had reached the provisional view, having reviewed the file in this case, that it would be appropriate to determine questions (a) and (b) set out at para 1 of her "*Note & Directions*", reproduced at my para 5(i)(a) and (b) below, without a hearing. Judge Lindsley gave the following directions:

   (i) Para 2 of the "*Note and Directions*" issued directions which provided for the party who had sought permission to make submissions in support of the assertion of an error of law and on the question whether the decision of the FtT should be set aside if error of law is found, within 14 days of the "*Note and Directions*" being sent to the parties; for any other party to file and serve submissions in response, within 21 days of the "*Note and Directions*" being sent; and, if such submissions in response were made, for the party who sought permission to file a reply no later than 28 days of the "*Note and Directions*" being sent.

   (ii) Para 3 of the "*Note and Directions*" stated that any party who considered that despite the foregoing directions a hearing was necessary to consider questions (a) and (b) may submit reasons for that view no later than 21 days of the "*Note and Directions*" being sent to the parties.

4. In response to the "*Note and Directions*", the Upper Tribunal has received the following:

   (i) on the Secretary of State's behalf, a document entitled "*Secretary of State's submissions*" dated 29 June 2020 by Mr Clarke, submitted to the Upper Tribunal under cover of an email dated 29 June 2020 timed at 13:58 hours; and

   (ii) on the claimant's behalf, the following documents:

      (a) a document entitled: "*Appellant's Submissions re Error of law*" dated 13 July 2020 by Mr Jafferji submitted by post under cover of a letter from London Imperial Immigration Services dated 13 July 2020 and by email of the same date timed at 14:28 hours; and

      (b) a document entitled: "*Appellant's Submissions re Oral Hearing*" dated 16 July 2020 by Mr Jafferji submitted by post under cover of a letter from London Imperial Immigration Services dated 16 July 2020 and by email of the same date timed at 15:21 hours.

The issues

5. I have to decide the following issues (hereafter the "*Issues"*),

(i) whether it is appropriate to decide the following questions without a hearing:

(a) whether the decision of the Judge involved the making of an error on a point of law; and

(b) if yes, whether the Judge's decision should be set aside.

(ii) If yes, whether the decision on the claimant's appeal against the Secretary of State's decision should be re-made in the Upper Tribunal or whether the appeal should be remitted to the FtT.

Whether it is appropriate to proceed without a hearing

6. On behalf of the Secretary of State, Mr Clarke submitted (at para 2) that the issue of whether the Judge's decision contains an error of law can be decided appropriately on the papers.

7. On the claimant's behalf, Mr Jafferji requested an oral hearing (para 1 of the submissions dated 16 July 2020). He submitted that the appeal is not straightforward, that there is a complex factual background and that the legal issues are also not straightforward. He goes on to say that without the ability to address the judge deciding these issues and any concerns that he or she might have with respect to the case, the claimant will be deprived of a full and proper opportunity to advance his case.

8. Mr Jafferji's submissions go on to rely upon Laws LJ's judgment in Sengupta v Holmes [2002] EWCA Civ 1104 at paras 38 and 47 and extracts including the judgment of Lord Bingham at para 35 and the judgment of Lord Slynn at para 48 of Smith v Parole Board [2005] UKHL 1.

9. Mr Jafferji submitted that an oral hearing is fundamentally important in order to ensure that the claimant is able to advance his case fully and properly; that, as the claimant is presently unaware of the view of the Upper Tribunal, he is unable to address any concerns or issues. Furthermore, the outcome of this appeal will have a profound impact on the Article 8 ECHR rights of the claimant, his ex-wife, his daughter by his ex-wife and his ex-wife's second daughter and includes consideration of the best interests of a minor child. He submitted that there is a serious risk that a decision on the papers alone would result in an unfair hearing and an unfair and unsafe decision on this appeal.

10. I have carefully considered Mr Jafferji's submissions.

11. I am aware of the guidance in the case-law, including the Supreme Court's judgment in Osborn and others v Parole Board [2013] UKSC 61. I have taken into account the guidance at para 2 of the Supreme Court's judgment.

12. Given that my decision is limited to the Issues, there is no question of my making findings of fact or hearing oral evidence or considering any evidence at this stage.

13. I take into account the force of the points made in Sengupta v Holmes [2002] EWCA Civ 1104 at para 38 and Wasif v SSHD [2016] EWCA Civ 82 at para 17(3)

concerning the power of oral argument as well as the decision in R v Sussex Justices, ex parte McCarthy [1924] 1 KB 256 to the effect that justice must be done *and* be seen to be done.

14. In addition, I take into account the seriousness of the issues at stake for the individuals concerned. For example, the principles explained in all of the cases I have mentioned are all the more critical when the case concerns a claim for international protection. Although the appeal in the instant case was not brought on asylum grounds, the appeal does concern the claimant's Article 8 claim which does involve consideration of the rights of others, including a minor child and her best interests. These are matters of some seriousness.

15. I have considered all the circumstances very carefully and taken everything into account, including the overriding objective.

16. I do not agree with Mr Jafferji that this appeal is not straightforward or that there is a complex factual background in this case or that the legal issues are not straightforward. It is self-evident, from para 19 of this decision onwards, that none of these epithets apply. In my view, none of these reasons, advanced by Mr Jafferji, are tenable.

17. Taking a preliminary view at this stage of deciding whether it is appropriate and just to decide the Issues without a hearing, I considered the Judge's decision, the grounds and the submissions before me. I was of the view, taken provisionally at this stage, that there was nothing complicated at all in the assessment of the Issues in the instant case, given that the grounds are simple and straightforward and the Judge's decision straightforward. I kept the matter under review throughout my deliberations. However, at the conclusion of my deliberations, I was affirmed in the view I had taken on a preliminary basis.

18. In all of the circumstances, and taking into account the overriding objective and having considered Osborn and others v Parole Board, I concluded that it is appropriate, fair and just for me to exercise my discretion and proceed to decide the Issues without a hearing.

Questions (a) and (b) - whether the Judge erred in law and whether her decision should be set aside

The basis of the claimant's Article 8 claim

19. The claimant, his then wife, Rina Piyushkumar Patel (hereafter referred to "RP") and his daughter, Isha Piyushkumar Patel (hereafter referred to as "IP"), came to the United Kingdom on 23 April 2005 as visitors and were granted six months' leave to enter in that capacity. They overstayed. In 2009, RP met and started a relationship with Mr Satinder Singh (hereafter referred to as "SS") and she had a daughter ("M", born on 2 November 2010) with SS. However the claimant did not know about the relationship and he believed that M was his child. He is named as M's father on her birth certificate.

20. The claimant and RP stopped living together in 2013 when M was old enough to know about the situation. But RP and M remain in close contact with him and see him

very regularly. On 23 May 2019, RP was granted leave to remain because of M who is a British citizen.

21. The claimant lives with IP and has regular contact with M. She calls him "Papa" and believes she has two fathers.

22. The claimant's Article 8 claim was also based on private life said to have been established in the United Kingdom since his arrival and difficulties that it is said he will experience on reintegrating in India such as to amount to very significant obstacles to his reintegration.

The Judge's decision

23. The Judge heard oral evidence from the claimant, RP and IP. The evidence before the Judge was that M lives with SS, her biological father, and RP and that she calls both SS and the claimant father/papa.

24. The Judge said that she found the claimant, RP and IP were credible witnesses (para 30).

25. The Judge found that there would not be very significant obstacles to the claimant's reintegration in India and therefore concluded that he did not satisfy the requirements of para 276ADE(1)(vi) of the Immigration Rules.

26. The Judge then considered the claimant's Article 8 claim outside the Immigration Rules.

27. The Judge found that the claimant does have family life with M. Her reasons are given at paras 36-37 which read:

> "36. I find that the [claimant] does have a family life with [M]. This is a very unusual case as for the first three to three and a half years of her life he believed that he was [M's] birth father. He is named on her birth certificate as her father as he had no idea about [RP's] relationship with [SS].
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> 37. The [claimant] and [M] established a father/daughter relationship when they lived together in a family unit for the first 3-3 1/2 years of her life. [M] believed him to be her father and I accept she believes that he is her father and she calls him papa."

28. At paras 40-42, the Judge considered whether the claimant had a genuine and subsisting parental relationship with M and whether it would be reasonable to expect M to leave the United Kingdom. She found that the claimant did have a genuine and subsisting parental relationship with M and gave her reasons for this finding at paras 40-42. She found that it would not be reasonable for M to leave the United Kingdom. Her reasons for this finding are given at paras 42-45. I shall now quote paras 40-45 of the Judge's decision:

> "40. The [claimant] falls within section 117B(6) as he is not liable for deportation. I have considered the case of RK as referred to by Mr Jafferji. This case held:
>
> > It is not necessary for an individual to have "parental responsibility" in law for there to exist a parental relationship.

> 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.

41. I find that he has a genuine and subsisting parental relationship with a qualifying child and it is not reasonable to expect [M] to leave the United Kingdom. I find that there is a genuine and subsisting parental relationship because as I have found above that for the first 3-3 1/2 years of [M's] life he believed he was her birth father. He is named on her birth certificate as her father. If anything I find that it is [SS] who has "stepped into the shoes of a parent".

42. I accept that [M] believes the [claimant] is her father and she calls him Papa. She is now aged 9 and has had two fathers in her life from when she *[sic]* aged 3-3 1/2. But the [claimant] has been there all her life. He still treats her as his daughter and I find takes a parental role in that he collects her from school and looks after her until [RP] collects her after she finishes work. He takes her to the Gujarati community school at the weekends and she sometimes stays over. I accept that when she stays with the [claimant] she has contact with her sister [IP], but I do not find that this is *[sic]* reason for being at the [claimant's] home. Because I have seen photographs of the [claimant] with [M], and photographs of him with [M], [RP] and [IP]. Further he collects [M] from school and stays with him *[sic]* until [RP] collects her. [IP] works and would not be at home at these times during the week.

43. The case of KO (Nigeria) [20181 UKSC 53 held that the conduct of the [claimant] is not a relevant consideration and children ought not to be punished for the situation of their parents.

44. I consider s 55 and best interests of [M]. I find that it is in [M's] best interests to maintain the status quo in her life. [M] believes that the [claimant] is her father and that she has two fathers, as her 2nd father is [SS]. He was not introduced into her life until she was aged 3-3 1/2.

45. The [Secretary of State] has not suggested that [M] goes to India and I do not find it would be reasonable for her to do so. She lives here with her mother and her biological father, [SS] who she now has a relationship. She is now aged 9 and is British."

29. The Judge then considered the public interest considerations in s.117B of the Nationality, Immigration and Asylum Act 2002 at paras 46-47, the claimant's relationship with his daughter IP at para 48 and concluded at para 49 that the decision was disproportionate because there were exceptional circumstances in the instant case. Paras 46-49 read:

> "46. However I do consider the public interest. I apply the case of AM (Malawi) [20151 UKUT 260 and the [claimant's] situation has always been precarious here. He came as a visitor and then overstayed his visit visa and it is clear to me that they had no intention of returning to India.
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> 47. The [claimant] speaks English and there was no evidence that there is reliance on public funds. I accept he is supported by his daughter, [IP]. But he has used the NHS for treatment for his diabetes.

> 48. I have accepted that the [claimant] and [IP] have a close relationship. They live together and she cares for him and are mutually dependent upon each other.
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> 49. Therefore balancing the rights of the [claimant] and [M], plus [IP] against the public interest I find that it is disproportionate for the [claimant] to return to India because of the exceptional circumstances in this case."

The grounds

30. The grounds challenge the Judge's finding that the claimant had a parental relationship with M. The grounds contend that the Judge made a "*material misdirection of law*" and may be summarised as follows:

(i) The finding that the claimant has a parental relationship with M despite the claimant not being her biological parent runs contrary to the guidance in Ortega (remittal: bias; parental relationship) [2018] UKUT 00298 (IAC) and R (RK) v SSHD (Section 117B(6): "parental relationship") IJR [2016] UKUT 00031 (IAC). The grounds rely, inter alia, upon head-note (3) of Ortega which states (emphasis supplied in the grounds):

> As stated in paragraph 44 of R (on the application of RK) v Secretary of State for the Home Department (Section 117B(6): "parental relationship") IJR [2016] UKUT 00031 (IAC), if a non-biological parent ("third party") caring for a child claims to be a step-parent, the existence of such a relationship will depend upon all the circumstances including whether or not there are others (usually the biologically parents) who have such a relationship with the child also. It is unlikely that a person will be able to establish they have taken on the role of a parent when the biological parents continue to be involved in the child's life as the child's parents.

(ii) As M currently resides with her biological father and mother, the grounds contend that the claimant cannot be said to have taken on the role of parent when "*the contrary situation is correct*".

(iii) The grounds contend that "*the full involvement of the child's biological parent would mean that the [claimant] no longer has a "parental relationship" with the child as the role is taken on by the child's biological parent with whom they currently reside*".

(iv) The Judge *"… erred in finding that the [claimant] being removed from the UK would not*[1] *result in the child having to leave the UK. As the child currently resides with her biological parents, there would be no requirement for the child to leave the UK in any event".*

Submissions

31. In the Secretary of State's submissions, reliance is placed on paras 42-44 of RK which I have considered very carefully and which read:

> "42. Whether a person is in a "parental relationship" with a child must, necessarily, depend on the individual circumstances. Those circumstances will include what role they actually play in caring for and making decisions in relation to the child. That is likely to be a most significant factor. However, it will also include whether that relationship arises because of

[1] The use of the word *"not"* in this sentence appears to be a typographical error.

> their legal obligations as a parent or in lieu of a parent under a court order or other legal obligation. I accept that it is not necessary for an individual to have "parental responsibility in law for there to exist a "parental relationship", although whether or not that is the case will be a relevant factor. What is important is that the individual can establish that they have taken on the role that a "parent" usually plays in the life of their child
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> 43. I agree with Mr Mandalia's formulation that, in effect, an individual must "step into the shoes of a parent" in order to establish a "parental relationship". If the role they play, whether as a relative or friend of the family, is as a caring relative or friend but not so as to take on the role of a parent then it cannot be said that they have a "parental relationship" with the child. It is perhaps obvious to state that "carers "are not per se "parents". A child may have carers who do not step into the shoes of their parents but look after the child for specific periods of time (for example whilst the parents are at work) or even longer term (for example where the parents are travelling abroad for a holiday or family visit). Those carers may be professionally employed; they may be relatives; or they may be friends. In all those cases, it may properly be said that there is an element of dependency between the child and his or her carers. However, that alone would not, in my judgment, give rise to a "parental relationship.
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> 44. If a non-biological parent ("third party") caring for a child claims such a relationship, its existence will depend upon all the circumstances including whether or not there are others (usually the biologically parents) who have such a relationship with the child also. It is unlikely, in my judgment, that a person will be able to establish they have taken on the role of a parent when the biological parents continue to be involved in the child's life as the child's parents as in a case such as the present where the children and parents continue to live and function together as a family. It will be difficult, if not impossible, to say that a third party has "stepped into the shoes" of a parent."

32. Para 13 of the Secretary of State's submissions draws attention to the fact that nowhere in the Judge's reasoning was there anything to suggest that the claimant makes any decisions in respect of M's upbringing, a factor identified as a significant one in RK, and that the "*parental role*" of the claimant identified at para 42 of the Judge's decision was indistinguishable from that of a carer who looks after a child for specified periods.

33. In his submissions, Mr Clarke draws attention to the following: that M does not live with the claimant; that there was no evidence from M's school regarding the claimant's role; that there was no evidence from the Gujarati community regarding the claimant's role; that there was no evidence of financial support; that there was no evidence from M; and that there was no evidence from M's biological father.

34. Mr Clarke submits that it was not open to the Judge to find that the claimant enjoyed a parental relationship with M for the purposes of s.117B(6), given:

(i) the paucity of evidence before the Judge;

(ii) the lack of any evidence or findings by the Judge as regards decisions that the claimant takes with regard to M's upbringing; and

(iii) that RK states that "*it is unlikely, in my judgment, that a person will be able to establish they have taken on the role of a parent when the biological parents continue to be involved in the child's life".*

35. I incorporate Mr Jafferji's submissions in my assessment.

Assessment

36. The Judge was plainly aware of the decision in RK. She referred to the case at para 40 of her decision and specifically quoted from the salient paragraph, i.e. para 42 of RK. She was plainly aware of its guidance to the effect that, in the case of a non-biological parent, it is necessary to consider the role that the individual plays and whether this establishes that he or she has "*stepped into the shoes*" of a parent.

37. Whilst it is the case that M was not living with the claimant and that there was no evidence before the Judge concerning the matters to which Mr Clarke has drawn attention and which I have summarised at para 33 above, the Judge was dealing with an unusual case, in that, M was born into a family unit with the claimant believing that he was her biological father and M looking to him as her biological father for the first 3-3 1/2 years of her life. In contrast, the decision in RK did not concern a case that involved the unusual circumstances that arise in this case.

38. If the question whether the claimant had a parental relationship with M had been considered at a time when neither he nor M were aware of the true position, it is inevitably the case, on any legitimate view, that the conclusion would have been that he did have a parental relationship with M notwithstanding that, on the true facts unknown to him and M, he was the third party and another man was the biological father. If the relationship did exist then, it is somewhat unrealistic to think that the claimant suddenly ceased to have a parental relationship with M the moment the true facts were revealed. Whether the parental relationship that had undoubtedly existed between the claimant and M during the first 3- 1/2 years of M's life had ceased as at the date of the hearing before the Judge was a matter for her.

39. The Judge was fully aware that the question was a case-specific one. She found, having heard the evidence, that, if anything, it was SS who had "*stepped into the shoes of a parent".* She was therefore plainly aware of this aspect of the guidance in RK and that it was the claimant who was the third party and not the biological parent.

40. The facts of this case are unusual, as I have explained. For the reasons given above, I agree with Mr Jafferji's submission that the Secretary of State's submissions, summarised at my paras 31-33 above, amount to no more than a disagreement with the Judge's finding, in the particular circumstances of this case.

41. I also agree with Mr Jafferji that the submission (summarised at my para 34 above), that it was not open to the Judge to find that the claimant enjoyed a parental relationship with M, is essentially a submission that the finding was irrational. As Mr Jafferji submits, irrationality was not pleaded in the grounds. In any event, given the unusual facts of this case, I simply cannot say that the Judge's finding that the claimant had a parental relationship with M was not reasonably open to her.

42. For all of the reasons give above, I am satisfied that the Judge did not err in law. The Secretary of State's appeal is therefore dismissed.

Notice of Decision

43. The decision of the First-tier Tribunal did not involve the making of any error on a point of law. The Secretary of State's appeal to the Upper Tribunal is therefore dismissed.

Upper Tribunal Judge Gill Date: 27 August 2020

NOTIFICATION OF APPEAL RIGHTS

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be **received** by the Upper Tribunal within the **appropriate period** after this decision was **sent** to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent:

2. Where the person who appealed to the First-tier Tribunal is **in the United Kingdom** at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is **12 working days (10 working days, if the notice of decision is sent electronically).**

3. Where the person making the application is in detention under the Immigration Acts**, the appropriate period is 7 working days (5 working days, if the notice of decision is sent electronically)**.

4. Where the person who appealed to the First-tier Tribunal is **outside the United Kingdom** at the time that the application for permission to appeal is made, the appropriate period is **38 days (10 working days, if the notice of decision is sent electronically).**

5. **A "working day" means any day except a Saturday or a Sunday, Christmas Day, Good Friday or a bank holiday.**

6. **The date when the decision is "sent' is that appearing on the covering letter or covering email**