



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-001848
First-tier Tribunal No:
HU/55919/2022
IA/08529/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 28 September 2023

Before

DEPUTY UPPER TRIBUNAL JUDGE GRIMES

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

N R

(ANONYMITY ORDER MADE)

Respondent

Representation:

For the Appellant: Mr T Lindsay, Senior Home Office Presenting Officer

For the Respondent: Mr F Kumar instructed by Bassi Solicitors

Heard at Field House on 5 September 2023

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the appellant and members of her family are granted anonymity due to the involvement of the appellant's minor grandchildren in the appeal.

No-one shall publish or reveal any information, including the name or address of the appellant, likely to lead members of the public to identify the appellant and members of her family. Failure to comply with this order could amount to a contempt of court.

DECISION AND REASONS

1. The Appellant in this case is the Secretary of State in this Chamber. However I refer to the parties as they were in the First-tier Tribunal.

2. The Secretary of State appeals to the Upper Tribunal against a decision of First-tier Tribunal Judge Juss dated 20 April 2023 allowing the Appellant's appeal against a decision made by the Secretary of State on 21 August 2022 to refuse to grant the Appellant's application for leave to remain based on her private and family life with her daughter and her daughter's three children.
3. The application for permission to appeal was refused by the First-tier Tribunal on 16 May 2023. The Respondent renewed the application and permission was granted by the Upper Tribunal on 19 June 2023 on the basis that it is arguable that the judge wrongly ascribed a "parental relationship" to the Appellant with respect to her grandchildren for the purposes of Section 117B(6) of the Nationality, Immigration and Asylum Act 2002 which in turn materially impacted upon his proportionality assessment under Article 8.

The background

4. The Appellant applied on 5 August 2021 for leave to remain on the basis of her private and family life. In the reasons for refusal dated 21 August 2022 the Respondent considered the application on the basis of the Appellant's private life under the Immigration Rules deciding that the appellant did not meet the requirements of paragraph 276ADE and also outside of the Rules and found that there were no compassionate factors in the Appellant's case to warrant a grant of permission to stay outside the Immigration Rules.

The First-tier Tribunal decision

5. At the appeal in the First-tier Tribunal the judge heard evidence from the Appellant, the Sponsor and the Appellant's granddaughter. The judge decided that the Appellant had not established that she met the requirements of the Immigration Rules and considered the appeal outside the Rules on the basis of the circumstances in the case. The judge noted that the claim had developed since the Respondent's decision in that the Appellant's oldest grandchild had been sexually assaulted by her stepfather and the Appellant's case is that she had now assumed the role of a parent in relation to the oldest child and the two younger children (the biological children of the Appellant's daughter's husband). It was the Appellant's case that her daughter is the breadwinner who spends all day at work and the Appellant looks after the children. The judge considered the decision in **SR (subsisting parental relationship, s117B(6)) [2018] UKUT 334 (IAC)**. The judge went on to consider the circumstances in this case noting at paragraph 19:

"In the instant case before me, it is clear that the Appellant, as the live-in grandmother of the two youngest children in the family (i) has a biological relationship with them, (ii) is in the position of being a primary carer; (iii) is both willing and able to look after the children; (iv) and is physically able to care for the child. In addition, it is clear on the evidence before me that she has a "genuine and subsisting parental relationship" with them given that (i) the children live with the Appellant; (ii) and they regularly do see each other."

6. The judge went on to consider the decision in **R (RK) v SSHD (s.117 B(6); "parental relationship" IJR [2016] UKUT 31 (IAC)** where the Upper Tribunal gave guidance on approaching the issue of determining whether a person has a parental relationship with a child.
7. The judge went on to find at paragraph 21:

"I find on the facts here that (i) that there is more than the usual emotional ties between the Appellant and the grandchildren which goes beyond Kugathas; (ii) that this is in circumstances where Jaswant, as the main parent is now removed from the family scene; (iii) that both the decision in SR (at §10), and in RK (at §13) as well as the SSHD's own guidance aids in showing how there is a genuine and subsisting parental relationship of the children with the grandparent; (iv) that the Appellant grandmother is the primary care-giver as Jaswant has no parental relationship with the two youngest children; that (v) these children in the UK are British and whose 'best interests' are to remain here; and (vi) that in any event requiring them to go with the grandmother to India would break up their relationship with their eldest sister 'T' who has permanent LTR in the UK".

8. The judge went on at paragraph 22 to consider the case law in relation to consideration of an appeal outside of the Rules and concluded at paragraph 24:

"I am satisfied that the Appellant can discharge the burden of proof that is upon her because the consequences of the refusal are unjustifiably harsh for the reasons I have already set out above. Section 117B expresses the public interest in immigration control and whereas it should be given the weight as a consideration that is intended for it that does not mean that it is to be applied disproportionately. Accordingly, this appeal is allowed."

The grounds of appeal

9. The Secretary of State appeals on two grounds. In the first ground it is asserted that the judge erred in finding that the Appellant has taken on a parental relationship in regard to the minor grandchildren. The Secretary of State accepts that whilst she has clearly taken on childcare duties, given her daughter's work commitments following separation from her husband, this is insufficient to demonstrate that she has elevated her position to one with associated responsibility for parenting. The Secretary of State relies on the decision in **RK**. At the hearing Mr Lindsay highlighted that the circumstances outlined in **RK** include what role a person actually plays "in caring for and making decisions" in relation to the child. The grounds highlighted that in effect an individual must "step into the shoes of a parent in order to establish a parental relationship". In the grounds the Secretary of State asserts that the description of the Appellant's relationship is such that it could easily be described as a relationship with any member of a children's extended families, a friend or even an employed carer who cannot be said to show a parental relationship. It is asserted that it has not been evidenced that the Appellant has taken over the role of the children's mother in making important decisions for the children and as such the relationship cannot be described as a parental one. It is further asserted that the father of the younger children is involved in their lives albeit currently limited to accompanied contact approved by social services therefore it cannot be said that he has relinquished his responsibilities as a parent nor has their mother. It is therefore submitted that it is unclear on what basis the Appellant has said to have stepped into the shoes of a parent. It is contended that the children's parents are both still involved in their lives albeit differently and as such it is asserted that the Appellant cannot be said to have taken on a parental role. Reliance is placed on the decision in **Ortega (remittal; bias; parental relationship) [2018] UKUT 00298 (IAC)** at headnote 3 which states that it is unlikely that a person will be able to establish that 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.

10. At the hearing Mr Lindsay submitted that Judge Juss went into detail in relation to the caring role but gave little or no detail in relation to whether the Appellant makes any decisions in relation to the children. Whilst he accepted that it is not always required for a person to show a decision-making role, in his submission the judge has to look at that aspect. He contended that the judge failed to assess whether the Appellant had stepped into the shoes of a parent. In his submission the finding of a parental relationship is incomplete and materially flawed. He further accepted that it is possible, but unlikely, that more than two people will have a parental relationship with a child. Whilst he accepted the very difficult circumstances in this case he submitted that the father (the stepfather of the elder child) continues to have a role with the children. In his submission Judge Juss failed to consider the position where both biological parents retain a role. He submitted further that at paragraph 16 the judge referred to the Respondent's review stating that it did not get to full grips with this aspect of the claim. In his submission the judge was wrong because the Secretary of State did engage with the issues in the case in the Respondent's review. In his submission in circumstances where there is no Presenting Officer it is even more important for the judge to engage with the refusal decision and the Respondent's review.
11. At the hearing Mr Lindsay further submitted that at paragraph 21 the judge referred to guidance from 22 February 2018, however this is not the current guidance, which is set out in the Respondent's review. He submitted that the current guidance does not aid the Appellant as it requires that the judge looks at whether there are two parents playing a parental role. In these circumstances, in his submission, the judge's finding in terms of the parental relationship is not sustainable. He acknowledged that the judge did not specifically consider this appeal under Section 117B(6) but submitted that as that the appeal was determined on the proportionality balancing assessment outside of the Immigration Rules, an important part of that consideration is Section 117B(6).
12. It is contended in Ground 2 that the appeal has apparently been allowed on the basis of the claim to parental relationship and that this finding materially altered the outcome of the proportionality balancing exercise and ultimately the outcome of the appeal. It is further contended therefore that the judge failed to give sufficient weight to the public interest in this case. At the hearing Mr Lindsay relied on the case of **Rajendran (s117B - family life) [2016] UKUT 138 (IAC)**. He referred to the little weight provisions which apply where a person has established a private life when their immigration status is unlawful or precarious and submitted that a family life can also carry little weight in these circumstances. In his submission it is clear from the reasons for refusal letter and the Respondent's review that this was a submission relied upon by the Secretary of State in this appeal.
13. In response Mr Kumar submitted that there is no error of law in relation to Ground 1. The judge assessed the evidence before him. The evidence before him was that at the time of the hearing the father of the two younger children was not allowed to see the children. He submitted that the judge looked at all of the evidence taking on the mantle of the Presenting Officer looking at all the issues including who looks after the children and was able to find the parental relationship and allowed the appeal outside the Rules. In his submission the guidance submitted may have been out of date but this does not go against what was considered and does not detract from the fact finding. In his submission if the decision is read holistically there is no material error of law and it was open to the judge to allow the appeal outside the Rules.

Discussion

14. This was an appeal under Article 8 on the basis of the Appellant's private and family life in the UK. There was no submission that the Appellant met any of the requirements of the Immigration Rules. Therefore the judge considered the appeal outside of the Rules. The judge set out in detail the oral evidence which included evidence in relation to the circumstances surrounding the sexual assault on the Appellant's daughter's oldest child. The Appellant's daughter gave evidence of the role played by the Appellant in looking after the children whilst she is at work [10].
15. In the reasons section of the decision the judge acknowledged that the Appellant cannot meet the requirements of the Immigration Rules and went on to consider the appeal outside the Rules under Article 8.
16. The judge noted that the claim in the appeal was rather different from that in the application and considered that the Respondent's review did not get to full grips with this aspect of the claim that is the sexual assault by the stepfather on the oldest child and the changed relationship between the Appellant and the children since that. At the hearing Mr Lindsay claimed that the judge was wrong to assert that the Secretary of State had not engaged with this aspect of the appeal. I note that at paragraph 19 of the Respondent's review the Respondent accepted that the Appellant's daughter's husband is no longer a part of the family unit because the others believed that he raped the child. The Respondent went on at paragraphs 20 to 24 to consider the relationship between the Appellant and the children. However I do not accept that the judge was wrong at paragraph 16 to state that the Secretary of State did not get to full grips with this aspect of the claim as this was not considered in any detail in the Respondent's review.
17. The judge set out the role played by the Appellant in the family since the change of circumstances caused by the breakdown of the parent's relationship. The judge set out the circumstances and the role played by the Appellant in detail at paragraph 16. The judge clearly accepted that this was the role played by the Appellant.
18. The judge went on to cite the case of **SR**. It is clear that at paragraph 18 where the judge set out the Home Office guidance this is an extract from the case of **SR**. The judge did not rely independently on the wrong guidance.
19. In any event the judge went on at paragraph 19 to carry out an assessment of the circumstances in which the Appellant and the children reside. The judge considered whether the Appellant has a parental relationship with the children in accordance with the guidance in **RK** and found at paragraph 21 that there were more than the usual emotional ties between the Appellant and grandchildren. It is clear reading the decision as a whole that the judge's findings in relation to the ongoing parental relationship was not specifically in relation to Section 117B(6). The decision relates more to an assessment of the current circumstances of the Appellant and the children and their ongoing relationship in the context of the assessment of Article 8 outside the Rules. The judge made a clear finding that there is a family life between the Appellant and the grandchildren [21]. The judge made a clear finding that the father is now removed from the family scene and he has no parental relationship with the two youngest children. These were findings open to the judge on the evidence.

20. The judge found that the Appellant is now the primary care giver as her daughter is working and she provides day-to-day care for the children. The judge made a clear assessment of the individual circumstances of this case. Having assessed all of the circumstances in this case the judge found that there are exceptional circumstances in this case.
21. The judge did not determine the proportionality assessment solely on Section 117B(6). Instead the judge undertook a full proportionality assessment and reached a conclusion open to him on the basis of the evidence.
22. I have considered the submission by Mr Lindsay that the judge failed to attach weight to the fact that the Appellant developed the private and family life whilst her immigration status was precarious. However it is clear from reading the decision as a whole that the judge had this in mind. The judge considered that the parental relationship and the role played by the Appellant in the lives of the children outweighed the public interest considerations in this case. I am satisfied that this was a finding open to the judge on the basis of the evidence. There is no material error of law in the judge's decision.

Notice of Decision

For the foregoing reasons my decision is as follows:

- (a) **The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law and I do not set aside the decision but order that it shall stand.**

A G Grimes

Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber

18 September 2023