IAC-BH-PMP-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/01177/2015

THE IMMIGRATION ACTS

Heard at Bennett House, Stoke	**Decision & Reasons Promulgated**
On 1st December 2015	**On 23rd February 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE GARRATT

Between

SM
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms A Vatish of Counsel instructed by Jade Law Solicitors
For the Respondent: Mr A McVeety, Senior Home Office Presenting Officer

DECISION AND REASONS

1. As this appeal involves the interests of a minor I continue the anonymity direction which I made when this matter first came before me in the Upper Tribunal on 26th October 2015.

2. In my decision sent out on 5th November 2015 I reached the conclusion that the decision of the First-tier Tribunal in this case showed an error on a point of law in relation to human rights issues only. The judge's decision to refuse the asylum and humanitarian protection claims was not affected by the error and could stand.

3. The judge who granted permission to appeal on 31st July 2015 thought it arguable that the judge had failed to consider the application of section EX.1. of Appendix FM to the Immigration Rules because of an erroneous conclusion (paragraph 93 of the First-tier decision) that the appellant did not fulfil the eligibility requirement as a partner under paragraph E-LTRP.2.2.2. at sub-section (b) as he was in the United Kingdom in breach of immigration laws. It was thought arguable that the provisions of EX.1. should, in fact, have been considered.

4. At the initial hearing before me in the Upper Tribunal I indicated that I was satisfied that the decision showed an error on a point of law because of the First-tier Judge's failure to consider the provisions of paragraph EX.1. In reaching that conclusion I pointed out that the First-tier Judge had been wrong to find that the appellant did not fulfil the eligibility requirements set out in E-LTRP.2.1. and E-LTRP.2.2., particularly sub-section (b). That was because the correct reading of sub-paragraph (b) did not exclude the application of paragraph EX.1. where an applicant is in breach of immigration laws.

5. My conclusion was also reached on the basis that the respondent had been wrong to assert, because of Home Office "guidance", that paragraph EX.1. could not apply to him because his relationship with his partner had not existed for at least two years prior to the date of application. In reaching conclusions about that matter it is evident that both I and representatives failed to take into consideration the provisions of paragraph GEN.1.2. in Appendix FM which defines "partner" as a person who has been living together with the applicant in a relationship akin to marriage or civil partnership for at least two years prior to the date of application. Although, in the First-tier decision, the judge was satisfied that the parties were in a genuine and subsisting relationship which had lasted for over two years from October 2012 the appellant's application to the respondent was on 16th July 2012 and so his partnership still fell outside the definition in GEN.1.2. so he could not benefit from the provisions of paragraph EX.1.

6. This matter therefore proceeds on the basis that the First-tier Judge was in error on a point of law in failing to consider that the provisions of paragraph EX.1. might apply in respect of the appellant's relationship with his partner and partner's child although, as I indicate in my decision, below, full consideration of the matter leads me to conclude that the applicant cannot benefit from the specific provisions of paragraph EX.1. in respect of either category.

The Hearing and the Appellant's Case

7. The appellant gave evidence adopting, as evidence-in-chief, the content of his statement which appears on pages 15 to 23 of his bundle submitted by representatives on 27th November 2015. In this, he confirms that his partner, Dr K, has settled status and her son, born on 4th May 2005, is a British citizen. He claims to have been in a durable relationship with his partner from the time they moved in together as a couple in October 2012. He explains that he is unable to produce any utility bills, bank statements or letters confirming his residence with his partner because his lack of status does not enable him to open accounts or take employment. He concedes that he does not contribute financially towards his family. His partner is a medical doctor with a "substantive" salary and she is the breadwinner for the family whilst he is the homemaker.

8. The appellant claims that his relationship with his partner's son, H, is "very strong". He is known as "uncle". They spend a lot of time together whilst his partner is at work. In particular he cares for H whilst his partner does nightshifts. He prepares meals for H, picks him up from school, takes him to extracurricular activities and assists him with his school work. He claims to have been able to provide a family life that was missing before. He hopes that, if allowed to stay, he will be able to marry his partner.

9. The appellant concedes that his partner has not told her parents about the relationship because of his lack of immigration status in the United Kingdom although their plans for the future would enable them to enjoy a normal family life. He claims that considerable disruption will be caused to his partner and her child if his appeal fails.

10. During cross-examination the appellant indicated that H's natural father has a court order enabling him to see his son during school holidays. He visits his father for periods of up to two weeks. He said that his partner had been separated for two years from her former husband before meeting him. When his partner lived on her own she had an au pair to look after H whilst she was at work. He explained that his partner is an anaesthetist at [-] Hospital.

11. Dr K then gave evidence. She adopted her statement which commences on page 19 of the bundle. In this she states that she obtained indefinite leave to remain in the United Kingdom on 1st December 2014 and describes herself as a "single mother". Her son's father is Dr M from whom she was divorced in 2009. She has an order giving her custody of her son which was made on 15th April 2013 in the [-] County Court. Her ex-husband has regular contact with his son, nevertheless, in accordance with the terms of the custody order. (Pages 151 to 153 of the bundle).

12. Dr K states that she became romantically involved with the appellant in 2011 before he moved in in October 2012. When she met him it never occurred to her to enquire into his immigration status. She claims that the presence of the appellant in her family has created the best years of their lives. H has benefited from the care which the appellant provides particularly when Dr K works at night. The appellant makes sure that H goes to school on time, is picked up, eats well and is well dressed and presented. He also makes sure that his homework is done. They all go out together as a family. Dr K believes she would never have been able to continue her professional commitments had the appellant not entered her life. She and the appellant wish to get married but plans for this cannot proceed until he is granted status. She states that, from the moment she learned about his immigration status, she has supported his claim.

13. At the hearing Dr K asserted that her son is physically and emotionally dependent upon her and her partner and could not say how it would be if he was forced to leave. She believes that her son is more attached to the appellant than his natural father.

14. During cross-examination Dr K said that her son speaks to his father on the phone and gets presents from him. She agreed that her son was of dual nationality and had visited Sri Lanka to see his grandparents. This had happened at least every two years. She also agreed that her former husband was from Sri Lanka. She contacts

her father in Ipnapura once a week. She hopes to obtain a British passport shortly. She said that her son calls his natural father "daddy".

Submissions

15. Mr McVeety made submissions on the basis that the provisions of paragraph EX.1. might apply. This was therefore on the basis that it would not be reasonable to expect Dr K's son to leave the United Kingdom and that there would be insurmountable obstacles to family life between the appellant and his partner continuing outside UK.

16. Mr McVeety submitted that, although H is close to the appellant, his relationship with him is not akin to a parent. It was clear that the child knew who his father is and sees him regularly. On this basis it could not be said that there was a genuine and subsisting parental relationship with that child. As to the existence of significant obstacles to family life continuing in Sri Lanka, Mr McVeety submitted that there were clearly significant connections with Sri Lanka for the appellant and his partner. Further, both grandparents were living there and H had visited the country to see them. There was no reason why all parties could not go to Sri Lanka to continue their family life bearing in mind that H has dual nationality. He thought that, in respect of the court order relating to contact, it was clear that the child's natural father could visit Sri Lanka also. The order could be varied.

17. Mr McVeety also made reference to the Court of Appeal decision in *SS (Congo)* [2015] EWCA Civ 387 on the basis that Article 8 imposed no general obligation on a state to facilitate a couple's choice to reside here. Human rights issues outside the Immigration Rules could only be considered where compelling circumstances existed not sufficiently recognised under those Rules. In this case there were no such compelling circumstances. In relation to the prospect of the appellant returning to Sri Lanka to reapply to join his partner this was not a case where there would be any financial problems. He believed it would not be disproportionate for the appellant to be returned on that basis. Under the provisions of Section 117B the appellant had not shown the English language ability required and little weight should be given to a relationship formed with a qualifying partner, particularly in relation to private life, at a time when that person's immigration status is precarious. He also reminded me that the respondent did not accept that the appellant had a genuine and subsisting parental relationship with the appellant's partner's child.

18. Finally, Mr McVeety submitted that, even if the matter were to be considered outside the Rules there were no compelling circumstances which could lead to the conclusion that Article 8 rights had been breached.

19. Ms Vatish relied upon her skeleton argument. This concentrates on the application of the Immigration Rules particularly the provisions of paragraph EX.1. on the basis that this can be applied both to the partnership claim and the child's interests. As to the court order granting specific rights of access to [H]'s natural father she asserted that any alteration to that order in relation to a move to Sri Lanka was speculative. She reminded me that the appellant's partner has settled status in the United Kingdom and is now able to apply for British nationality to make UK her home. She emphasised that the evidence should lead to the conclusion that the appellant is part of a closely-knit family unit involving his partner and her child. There would therefore

be significant obstacles to family life continuing outside the United Kingdom. She also reminded me that [H] is now 10 and is a British citizen and it would not be reasonable to expect that child to leave [the] UK, particularly bearing in mind his mother's work in UK and her intention to continue life here.

20. In conclusion Ms Vatish drew my attention to the Upper Tribunal decision in *Hayat* [2011] UKUT 00444 (IAC) about the significance of *Chikwamba* [2008] UKHL 40 which was to make it plain that, where the only matter weighing on the respondent's side of an Article 8 proportionality balance is the public policy of requiring an application to be made under the Immigration Rules from abroad, that objective can be outweighed by factors resting on the appellant's side of the balance which is not confined to cases where children are involved.

21. Ms Vatish urged me to allow the appeal.

Decision and Reasons

22. In immigration appeals the burden of proof is on the appellant and the standard of proof is a balance of probabilities.

23. My approach to this appeal is guided by the decision of the Court of Appeal in *SS (Congo)* [2015] EWCA Civ 387. I have first considered whether, in relation to the Article 8 issues raised, the Immigration Rules, particularly those set out in Appendix FM and paragraph 276ADE, can benefit the appellant and then, if not, I have considered whether there are any compelling circumstances not sufficiently recognised under the Rules which require a grant of leave.

24. I have already indicated that the partnership rules under Appendix FM cannot benefit the appellant. Although it would appear, particularly from the analysis set out in Ms Vatish's skeleton argument, that the appellant can meet the general, suitability and eligibility requirements set out in Appendix FM to enable paragraph EX.1 to apply, those assertions do not take into consideration the definition of partner set out in GEN.1.2. That is, a person who has been living with the applicant in a relationship akin to a marriage or civil partnership for at least two years *prior to the date of application* (my emphasis). Whilst the First-tier Judge originally hearing this appeal concluded that the parties were in a relationship akin to marriage for at least two years, that did not take account of the fact that the application which forms the basis of this appeal, was made on 16th July 2012 at a screening interview when the parties did not start living together until October 2012. Although section R-LTRP applies paragraph EX.1, the eligibility provisions in E-LTRP.1.2 - 1.12. are also to be met. In each case reference is made to a partnership within the limited meaning set out in GEN.1.2. Thus, the Rules cannot benefit the appellant in relation to the claimed partnership.

25. As to the appellant's claimed relationship with his partner's child the eligibility requirements set out in E-LTRPT.2.3 require the applicant to have sole parental responsibility for the child or (under sub-paragraph (b)) the parent or carer with whom the child normally lives must be not only a person settled in the United Kingdom or a British citizen but *not* the partner of the applicant (which includes a person who has been in a relationship with the applicant for less than two years prior to the date of application).

26. I am unable to conclude that the applicant has sole parental responsibility for his partner's child as clearly there is joint responsibility with additional responsibility resting with the child's natural father who has the benefit of a custody/family arrangement order. The appellant clearly cannot benefit from the alternative requirements set out in sub-paragraph (b) as he is the partner of the applicant and a person who had been in a relationship with the applicant for less than two years prior to the date of application. Thus, paragraph EX.1. is excluded from consideration in relation to the appellant's partner's child.

27. As to the application of paragraph 276ADE of the Immigration Rules, it is necessary for me to consider whether or not there would be very significant obstacles to the applicant's integration into Sri Lanka if required to leave UK. The evidence put before me does not show that there would be such obstacles. The appellant is of Sri Lankan origin, it has been decided that he is not a refugee from that country, and has relatives there. Although the appellant has been in the United Kingdom since 2004 he spent his youth and formative years in Sri Lanka. He can re-integrate into Sri Lankan society with little difficulty.

28. As I have concluded that the appellant cannot benefit from the provisions of the Immigration Rules in relation to his claim to remain in UK on human rights grounds, I have considered whether there are any compelling circumstances which would enable me to consider his claims outside the Immigration Rules having regard to the public interest consideration found in Section 117B of the Nationality, Immigration and Asylum Act 2002 in relation to the proportionality of the respondent's decision. My conclusions on that matter follow.

29. The appellant has failed to benefit from the Immigration Rules for the principle reason that he has not been in a partnership for the requisite two year period before his application. Nevertheless, as I am able to conclude, as the First-tier Judge did, that the appellant is in a genuine and subsisting partnership akin to marriage with Dr K I consider this is a circumstance not sufficiently recognised under the Rules in relation to an Article 8 claim which requires consideration at the date of hearing. I have therefore gone on to consider whether the circumstances of the appellant's relationship with his partner and her child point to a breach of Article 8 family and private life rights if the parties are returned. In doing so I have applied the five stage *Razgar* tests.

30. In reaching my conclusion that the parties are in a genuine and subsisting relationship akin to marriage, I have taken into consideration the consistent evidence which both appellant and his partner have given about his involvement in family life incorporating the significant assistance which he gives to the appellant's child, a British citizen. The appellant has, I accept, shown that he has been in this relationship since he started living with his partner in October 2012, over three years ago.

31. As far as the appellant's relationship with his partner's child is concerned, I am not able to conclude that this is a genuine and subsisting parental relationship. The child clearly continues his relationship with his natural father whom he sees during school holidays as permitted by the custody order. [H] still calls his father "daddy" and the appellant is referred to as "uncle". In *R (On the application of RK) (s.117B(6); parental relationship") IJR* [2016] UKUT 31 (IAC), the Upper Tribunal concluded that,

whether a person who is not a biological parent is in a "parental relationship" with a child for the purposes of Section 117B(6) of the 2002 Act, depends on the individual circumstances and whether the role that individual plays establishes he or she has "stepped into the shoes" of a parent. That is not the case here. Whilst it is clear that the appellant cares for his partner's child and has established a good relationship with that child, there is no doubt that the child's natural father retains a strong paternal interest by exercising his access rights. Whilst I accept that it is not beyond the bounds of possibility for there to be two individuals having a parental relationship with a child with the existence of a *de facto* step-parent, I do not conclude that such a situation exists here for the reasons I have given and because of the relatively short relationship of about three years between appellant and partner. In reaching these conclusions I have considered the three questions raised in paragraph 35 of *R* about the existence of parental relationship. Whilst I acknowledge that the appellant is willing and able to look after the child and is physically able to do so I have to bear in mind that the child's other biological parent plays an integral part in the child's life.

32. I should indicate that, in reaching my conclusions, I have made the best interests of the appellant's partner's child a primary consideration and having regard to the respondent's obligations under Section 55 of the Borders, Citizenship and Immigration Act 2009. The best interests of the child in this appeal are to be with his mother with access to his father with whom he still, evidently, has a parental relationship albeit defined by a court order. Although this means that, in the present circumstances and without a variation to the court order, I do not regard it as reasonable to expect the child to leave the United Kingdom with its mother but that does not mean that the respondent's decision should be regarded as disproportionate. That is because, as Mr McVeety asserted, it would not be disproportionate for the appellant to return to Sri Lanka and then apply for entry clearance as a partner or, if circumstances allow, a spouse. Certainly there would appear to be no financial difficulties with such an application and, since it has already been established that the appellant's partner and her child have visited their country of origin on a relatively regular basis, there would be relatively little disruption to family life. Whilst it is not beyond the bounds of possibility that all parties could maintain their family life by returning to Sri Lanka together (if there is a suitable variation to the court order relating to the child) I do not put this forward as a main reason for dismissing the human rights claim. It is, however, for me to take into consideration that separation of the parties will not give rise to compelling circumstances warranting the grant of leave to remain. That conclusion is reached having regard to *Hayat* and the *Chikwamba* principles but taking account of the proportionality of the decision under section 117B of the 2002 Act.

33. In considering the application of Section 117B of the 2002 Act in relation to the public interest, the reasons I have already given show that little weight should be given to a private life established whilst the appellant's immigration status was precarious and I have already concluded that the appellant is not in a parental relationship with his partner's child.

Notice of Decision

The decision of the First-tier Tribunal showed an error on a point of law such that it should be re-made on human rights issues only.

The decision of the First-tier Tribunal to dismiss the asylum and humanitarian protection claims stands.

I re-make the decision in relation to the human rights claim by dismissing it.

Anonymity

I renew the anonymity direction already made in the Upper Tribunal in the following terms:

DIRECTION REGARDING ANONYMITY – RULE 14 OF THE TRIBUNAL PROCEDURE (UPPER TRIBUNAL) RULES 2008

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) I make an anonymity order. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the original appellant. This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings.

Signed Date

Deputy Upper Tribunal Judge Garratt

TO THE RESPONDENT
FEE AWARD

As no fees were payable and because I have dismissed the appeal there can be no fees award.

Signed Date

Deputy Upper Tribunal Judge Garratt