Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/31141/2014**

THE IMMIGRATION ACTS

Heard at Field House	**Decision and Reasons Promulgated**
On 29 September 2015	**On 1 June 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE BAGRAL

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

EBS
(Anonymity Direction made)

Respondent

Representation:
For the Appellant: **Mr C Avery, Senior Home Office Presenting Officer**
For the Respondent: **Mr D Balroop, Counsel**

DECISION AND REASONS

Anonymity

1. This appeal is subject to an anonymity order made by the First-tier Tribunal. Neither party invited me to rescind the order. I continue it pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698 as amended).

Background

2. This is an appeal by the Secretary of State for the Home Department (hereafter "the Secretary of State") against the decision of a panel of the First-tier Tribunal (FtT) (Judge M Loughbridge and Judge N J Osbourne). On 21 April 2015 the FtT allowed the appeal of EBS (hereafter "the claimant") against a decision of the Secretary of State dated 7 July 2014 giving directions for his removal under section 10 of the Immigration and Asylum Act 1999.

3. The claimant arrived in the United Kingdom in 1998 accompanied by his uncle. On arrival his uncle seized his passport and he was put to work as a labourer. In 2001/2002 the claimant's uncle was shot and paralysed in Ghana during a business trip. He never returned to the United Kingdom. Subsequently, his uncle's girlfriend asked him to leave the home and he was taken in by his mother's half sister. A subsequent application to remain with her as a family member under EU law was refused on 5 February 2009. The claimant began a relationship with a woman he had known since 2006 and began cohabiting with her. The relationship broke down in 2012 and the claimant went to live with an aunt. In April 2013 the claimant met a woman on an internet dating site. Initial contact was by telephone and in June 2013 they met in person. The relationship progressed and in 2014 the claimant moved into his partner's home which she shared with her youngest son. The claimant developed a close relationship with his partner's son and took on the role of a father-figure. In the circumstances, the claimant argued that removal would be a disproportionate interference with his established family and private life.

The Decision of the FtT

4. The FtT heard evidence from the claimant and his partner and found that their evidence was credible and compelling [17]. Based on their evidence the FtT was satisfied that their relationship was genuine and further accepted that there was a genuine father/son type relationship between the claimant and his partner's son. The FtT noted the vulnerable status of the claimant's partner when they first met – she was suffering from depression and stress as a result of financial problems, lack of family support and a subsequent breakdown [17]. The FtT accepted the claimant's presence had had a positive impact on his partner's mental health and on her son's, particularly in respect of his education. The FtT observed the closeness of the family unit but accepted that in all likelihood the relationship would come to an end if the claimant was required to leave the United Kingdom as the claimant's partner would remain in the UK with her minor son. The FtT found that the son was an insurmountable obstacle to the claimant and partner continuing family life together in Ghana [25].

5. The FtT next turned to consider the Immigration Rules with reference to paragraph EX.1.(b) and EX.2. of Appendix FM, and concluded that the

Exception therein applied on account of their being insurmountable obstacles to family life continuing in Ghana as a consequence of the partner's minor son whose interest lay in the United Kingdom. The FtT thus found that the Secretary of State's decision was not in accordance with the law and Immigration Rules [25].

6. The FtT proceeded to consider Article 8 outside of the Rules. The FtT found that removal would amount to an interference with family and private life. It observed that paramount to the question of proportionality was the best interests of the partner's son. The FtT noted that the Secretary of State had not undertaken a proper assessment of the best interests of the child in accordance with her duties under section 55 of the Borders, Citizenship and Immigration Act 2009, as her decision was founded upon her view that the relationship between the claimant and partner was not genuine. The FtT thus concluded that the Secretary of State was required to make a *"proper section 55 assessment"*. The FtT further observed that *"… the importance of [the son] relationship with the Appellant is so overwhelming that it is likely to be disproportionate to remove the Appellant from the UK"*, and gave a strong indication, as the claimant continued to have an, *"… extremely positive impact on [the son] at a critical stage of his formative years"*, that there was *"… A very strong case … for the Appellant being permitted to remain in the UK"* [37].

   Thus the FtT allowed the appeal *"under the Immigration Rules and the ECHR to the extent that it is remitted to the Respondent for a decision taking proper account of [the son] best interests under section 55."*

7. The Secretary of State appealed. Permission to appeal was granted by First-tier Tribunal Judge Shimmin on 25 June 2015.

8. The matter came before me to determine whether the FtT erred in law.

Decision on Error of Law

9. Whilst I agree with Mr Avery that there is a degree of confusion and error in the decision of the FtT, I am not satisfied that the infelicities are material such that it vitiates the decision and requires it to be set aside.

10. The grounds of appeal argue essentially that the FtT failed to take into account and/or resolve conflicts of fact or opinion on material matters raised in the refusal letter. The grounds point out that the FtT failed to consider that the Secretary of State took issue with the absence of evidence confirming the identity of the claimant's partner. Mr Avery, rightly, did not pursue that challenge as the FtT had before it a copy of the partner's passport.

11. The grounds also advance a reasons challenge in respect of the FtT's finding at [17] that the relationship between the claimant and his partner was genuine and subsisting and, further state that there was no corroboration from any third party, and that, the FtT failed to take into account the claimant's poor

immigration history. I find that there is no merit in these grounds. The FtT had the benefit of hearing oral evidence from the claimant and his partner. The FtT found their evidence was "*entirely credible*" and considered that they gave "*compelling oral evidence*". The FtT was aware of the claimant's immigration history and made reference to the level of detail of the evidence and gave two examples which supported its conclusion. That conclusion was clearly supported by the evidence before the FtT which it made detailed reference to at [8] to [14]. The conclusion of the FtT was thus sufficiently reasoned and was entirely open to it on the evidence. Further, there was no requirement to corroborate that evidence by reference to a third party. I find that the grounds amount to a disagreement with the FtT's findings and identify no error of law in its approach.

12. Where the FtT did fall into error was in respect of the approach it adopted to its consideration of the appeal under the Exception to the Immigration Rules, there being no dispute that the requirements of Appendix FM were not met. The FtT found that the decision to remove the claimant was "*not in accordance with the law and the applicable Immigration Rules*" because the partner's son was an insurmountable obstacle to family life continuing outside the United Kingdom [25]. The FtT, however, failed to recognise that the claimant's partner was not a qualifying partner under Appendix FM because their relationship did not meet the definition of a "partner" under the provisions of Gen.1.2(iv), which requires the claimant to have lived with his partner for at least two years prior to the date of application. The evidence before the FtT was that the couple had cohabited from mid-2014, which was around the time the claimant made his application. The claimant therefore could not benefit from the provisions of the Exception and the FtT was wrong to conclude otherwise. I shall turn to consider the materiality of this error in due course.

13. The FtT then proceeded to consider Article 8 outside of the Rules. Applying the principles in Razgar [2004] UKHL 27, the FtT found that there was an interference with family and private life. Next, the FtT set out its observations in respect of proportionality and stated that, if its consideration was limited to the human rights of the claimant and his partner, then it was not disproportionate to remove the claimant as it was reasonable to expect the partner to relocate to Ghana [35]. However, the FtT considered that this was an "*artificial assessment*" because the decision-maker had failed to undertake a proper section 55 assessment of the son's best interests who was clearly "*a very important part*" of the "*overall picture*" because the decision was "*entirely premised on the Respondent's view that the relationships between the Appellant and [partner/son] are not genuine, meaning that any section 55 assessment would be an essentially meaningless and hollow exercise. Given that the Tribunal has reached a different conclusion of the facts, a proper section 55 assessment is now required.*" [36]

14. Next at [37] the FtT considered that it was not for it to be a primary decision-maker and went on to indicate its view as to proportionality and stated the following: "*It is not for this Tribunal to be a primary decision-maker regarding a*

section 55 assessment. However, we do take this opportunity to indicate that, in our opinion, the importance of [the son's] relationship with the Appellant is so overwhelming that it is likely to be disproportionate to remove the Appellant from the UK". The FtT summarised its conclusion thus: *"Overall, the Appellant has had, and continues to have, an extremely positive impact on [the son] at a critical stage of his formative years. This leads to a very strong case, in our view, for the Appellant being permitted to remain in the UK.* ***We recognise however that our indication is no more than guidance and is not binding on the Respondent."*** [My Emphasis]

15. In its omnibus conclusion at [40] the FtT stated :

"In the light of the above conclusions, we find that the Decision appealed against should be remitted to the Respondent for a proper section 55 assessment of [the son's] best interests given that there is a genuine and positive relationship between him and the Appellant."

16. The FtT then at [42] announced its decision in the following terms:

"The Respondent's decision was made without proper consideration of the best interests of [the son's] under section 55 name the Act [sic] and therefore was taken otherwise than in accordance with the law. Consequently, we allow the appeal under the Immigration Rules and the ECHR to the extent that it is remitted to the Respondent for a decision taking proper account of [the sons'] best interests under section 55."

17. The grounds of appeal argue that it was not open to the FtT to reach a decision in respect of proportionality if it considered that the decision was not in accordance with the law. That is a misreading of the decision. In my judgement, the FtT was simply purporting to give its observations in respect of proportionality and made clear that that was a question initially to be answered by the Secretary of State with due consideration being given to her duties under section 55. It was further argued that the Secretary of State gave due consideration to such duties in her decision. I disagree. I am satisfied that the FtT's summary of the position at [36] is correct. Whilst the Secretary of State's decision gives lip service to the provisions of section 55, it is clear that she did not undertake an assessment of the child's best interests because the duty did not arise as a consequence of her doubts in respect of the relationship between the claimant and his partner. The FtT did not therefore err in its adopted approach.

18. Whilst the FtT's conclusion allowing the appeal under the Immigration Rules to the extent that the decision was not in accordance with the law was incorrect for the reasons that I indentified earlier, I find that this error is not material to the outcome because it was open to the FtT to allow the appeal to a limited extent because it found the decision appealed against on human rights grounds was not in accordance with the law. On a holistic reading of the decision, whilst the FtT should have expressed its decision with greater

care and clarity, it is clear that that is what the FtT was purporting to do at [42].

19. In MK (section 55 – Tribunal options) [2015] UKUT 223 (IAC) (15 April 2015) the President of the Upper Tribunal said, inter alia, at [38]:

> *"We consider that there can be no objection in principle to an order of the Tribunal the effect whereof is to require the Secretary of State, rather than the Tribunal, to perform the two duties imposed by section 55. There is no jurisdictional bar of which we are aware. It has long been recognised that there is a category of cases in which it is open to both tiers to allow the appeal on the basis that the Secretary of State's decision was not in accordance with the law without further order, thereby obliging the Secretary of State, as primary decision maker, to re-make the decision, giving effect to and educated and guided by such correction and guidance as may be contained in the Tribunal's determination. This is not contested on behalf of the Secretary of State."*

20. That is the very approach the FtT adopted and was entitled to do so for the reasons that it gave. Its decision, properly understood, was to give effect to section 55, under which the Secretary of State was bound to discharge her duties which she had not hitherto properly done so.

Notice of Decision

21. I am satisfied the decision of the FtT is not vitiated by an error of law. Accordingly, the decision of the FtT shall stand. The effect of this decision is that the Secretary of State must now reconsider the claimant's application which remains outstanding in light of the findings made by the FtT and the best interests of the child.

Signed: Dated: 1 June 2016

Deputy Upper Tribunal Judge Bagral