



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: IA/52381/2013

THE IMMIGRATION ACTS

Heard at Field House  
On 25 April 2018

Decision & Reasons Promulgated  
On 01 June 2018

Before

UPPER TRIBUNAL JUDGE CONWAY

Between

ZS

(ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Bartram  
For the Respondent: Ms Willocks-Briscoe

DECISION AND REASONS

1. The appellant is a citizen of Uganda born in 1980. He appeals against a decision made by the Respondent on 25 November 2013 to refuse him leave to remain.
2. The history is that he claims to have entered the UK in July 2009 with entry clearance as a visitor. He applied for a residence permit as the family member of a Swedish national in May 2011 which was refused in September 2011. He applied for leave to remain on 2 November 2012 as the partner of PM ('the partner') which was refused on 27 November 2013. His appeal was dismissed on 7 August 2014 but the Upper Tribunal allowed his appeal on 5 November 2014 and remitted the case to be re-heard.

**First tier hearing**

3. Following the rehearing at Hatton Cross on 30 November 2016 Judge of the First-tier NJ Bennett dismissed the appeal.
4. The family situation is as follows: the appellant and the partner, a Ugandan citizen, have one child (RRS) ('the son') who is a Ugandan citizen and was born in 2013. The partner (PM) has one other child (RM) ('the elder child') who is a British citizen born in March 2011. The partner and the son have been granted leave to remain until March 2019.
5. The reasons for refusal were in summary: it was not accepted that the appellant was the partner's partner for the purpose of Appendix FM because he was not her fiancé, was not married to her, and did not live with her in a relationship akin to marriage; the appellant did not meet the eligibility requirements for leave to remain as a partner in any event because the partner was not a British citizen, was not settled here and she has not been granted leave as a refugee or humanitarian protection. The appellant did not qualify for leave to remain as the parent of the elder child because he did not have parental responsibility for the elder child. Consequently, section EX1.1 did not apply and the appellant could not claim to have established a family life in the UK within the meaning of article 8. It was also not accepted that she met the requirements of paragraph 276ADE of the Rules.
6. The appellant and the partner gave evidence. In submissions on his behalf it was accepted that he could not succeed under the Immigration Rules. The crux was that the decision would split the family. It was clear that the appellant and the partner had a genuine and subsisting relationship. It would be unreasonable to expect the elder child, a British citizen, to go to Uganda.
7. The judge's reasons are at paragraph 31ff.
8. He found, as had been accepted, that the appellant could not succeed under the Rules either on the partner route or under paragraph 276ADE(1)(vi) (at [31]).
9. Going on to consider the case under article 8 outside the Rules he found that the appellant had established family life with the partner and the two children [32].
10. Advancing to proportionality he said that the effect of the decision is that the partner has a choice between staying here with the children and taking the children to Uganda with the appellant [36].
11. He did not accept that section 117B(6) of the Nationality, Immigration and Asylum Act 2002 applies to the appellant's relationship with the elder child "*because the appellant cannot have a parental relationship as they are not related as parent and child, whether by blood or by adoption*", adding that "*the appellant is not even the elder child's step-father because he is not married to the partner.*" [37]

12. Going on to consider the best interests of the children, he found that for the son these were to be brought up by both parents and for the elder child that he be brought up with the partner, his half-brother and a father figure. It may be that their best interests would be best served by being brought up in the UK. However, the reality included that the appellant has no right to remain here, the partner and the son only have discretionary leave to remain and that there is a public interest in maintaining effective immigration control [40].
13. In further considering the children's situation he noted that both had lived in this country all their lives, the elder child having only visited Uganda once, briefly. However, the elder child, approaching six years of age, is at the beginning of his education. Also, they are both of Ugandan heritage and there was no reason to believe they would have any language difficulties in adapting to life there. Nor were there any medical issues. There was no reason why the appellant and her partner would not be able to support them, nor would they be deprived of a proper education [41,42]
14. Given further consideration to the elder British citizen child the judge found that he has yet to start his schooling and, having limited contact with his father by phone, such could continue from Uganda [45]. Having British citizenship is not a trump card. He would likely be educated in English and could gain the benefits of Ugandan citizenship through the partner.
15. He concluded in respect of best interests that whilst they would be for both children to remain here such was not so strong as to make it unreasonable to expect them to go to Uganda with the appellant and the partner.
16. The judge ended by giving further consideration to the partner's interests. She is well placed to readapt to life there, young enough to build a private life there and to resume old connections. She can keep in touch with contacts in the UK. Any private life established in the UK has little weight as she was here precariously [49]. Finally, in respect of the appellant he too had established private life while here illegally or precariously. He, too, could continue activities including with an AIDS charity in Uganda and he too could keep in touch with contacts here by modern means of communication.

### **Error of law hearing**

17. The appellant sought permission to appeal which was refused. However, on renewed application to the Upper Tribunal permission was granted on 20 September 2017.
18. At the error of law hearing before me Mr Bartram accepted that the judge had given careful thought to his decision. However, there were errors. The major one was that the judge failed to give appropriate consideration to section 117(6), in particular in respect of the parental relationship between the appellant and the elder child. His finding that being not related there could be no such relationship was wrong.

19. Mr Nath's submission was that the decision showed detailed analysis with much on the children's best interests. He made reference to section 117B (6). Having done so he weighed up the public interest. Looked at overall his findings were open to him.

**Decision on error of law**

20. In considering this matter as both representatives stated the judge showed full and careful analysis in his detailed findings, in particular in respect of the children's best interests.
21. The reference at [45] to the elder child having yet to start his schooling is inaccurate, the child being aged six. It is unimportant in light of the detailed consideration of that child's best interests.
22. The one major problem with the decision is at [37] where the judge stated that he did not accept that section 117B of the 2002 Act applies to the appellant's relationship with the elder child because "*the appellant cannot have a parental relationship as they are not related as parent and child whether by blood or by adoption*". He went on "*If parliament had intended that the words 'parental relationship' should have a wider meaning; it would have said it. I would add that the appellant is not even the elder child's step-father because he is not married to the partner*".
23. Unfortunately, this is an incomplete statement of the law. In ***R (on the application of RK) v SSHD*** (S117B(6); 'parental relationship') IJR [2016] UKUT31 (IAC) the Upper Tribunal held:-

*"1. It is not necessary for an individual to have 'parental responsibility' in law for there to exist a parental relationship.*

*2. Whether a person who is not a biological parent is in a 'parental relationship' with a child for the purpose of S117B(6) [2002 Act] depends on the individual circumstances and whether the role that individual plays establishes he or she 'stepped into the shoes' of a parent ..."*

[headnote]

24. Section 117B(6) reads:

*"In the case of a person who is not liable to deportation, the public interest does not require the person's removal where –*

- (a) The person has a genuine and subsisting parental relationship with a qualifying child, and*  
*(b) It would not be reasonable to expect the child to leave the United Kingdom."*

25. In failing to apply the applicable law on this issue the judge erred. It is a material error because in failing correctly to consider section 117B(6) such must infect the findings in respect of the reasonableness of the British citizen child moving to

Uganda. It was agreed that in view of the error of law a focused analysis on whether there is a parental relationship and if so, it is reasonable to expect the elder child to leave was required. It was noted that it was around a year since the First-tier hearing and that further evidence was to be led.

26. The decision of the First-tier Tribunal was set aside and the matter adjourned to a resumed hearing.

### **Resumed hearing**

27. Thus the case came before me again on 25 April 2018. An updated bundle was lodged which included witness statements from the appellant and his partner, who is now his wife.
28. I heard evidence from the appellant. He adopted his statement (17 April 2018). In brief cross-examination he said that the aunt who used to support him no longer does so as she is now living in Sweden. He and his wife continue to get some practical and financial support from friends. His wife is holding down two jobs. She earns in excess of £18,000.
29. He agreed he could use the skills he has acquired in Uganda but said he would prefer to use them here. Asked about language skills he said both he and his wife speak English and Lugandan. The children have picked up Lugandan but when spoken to invariably reply in English.
30. He said the older child continues to receive phone calls from his birth father every month or two.
31. His wife also gave evidence. She too adopted her statement. Asked if she would be prepared to go and live in Uganda with her husband she said it would be hard. She has made her family here. With young children she would prefer them to grow up here. Asked if the children speak Lugandan she said only a few words, nothing substantial.
32. Asked if they relied on support from family and friends she said they particularly used to rely on an aunt but no longer as she is now in Sweden. It is not an issue now as she herself is working in health and social care and is able to support the family.
33. In submissions, Ms Willocks-Briscoe, who made no challenge to the oral evidence, said the appellant cannot meet the Rules. The issue is proportionality. The appellant has a poor immigration history. Significant weight should be given to the public interest. Whilst the best interests of the children may well be for them to remain in the UK the appellant's removal would not be disproportionate. Whilst there would doubtless be some effect on the children there was no medical or social work evidence to indicate that such would be especially significant. He has work skills which he could put to use in Uganda.

34. Mr Bartram's response was if he returned to Uganda the appellant would have no opportunity to make an entry clearance application until his wife got settlement in 2024. The only other option was for the whole family to relocate to Uganda. It was not reasonable for the two young children both settled at school, and one a British citizen to be expected to leave. Such was, indeed, still the position under the Respondent's policy. Mr Bartram added that it was clear his partner, who is now his wife, is in work, her income is more than £22,000. Both speak English. He has the skills to work.

### Consideration

35. In considering this matter it is clear that this case shows family life. Such includes between the appellant and his now wife and between them and their two children. I am entirely satisfied, and indeed it was not challenged, that the appellant has a genuine and subsisting parental relationship with the elder child. They have been able to live together since his wife received her residence card in 2013.
36. It is clear that the removal of the appellant would have consequences of significant gravity as to engage Article 8. Such would be in accordance with the law and in pursuit of a legitimate aim of immigration control.
37. I note the Respondent's guidance, Family Life (as a Partner or Parent) and Private Life: 10 Year Routes (February 2018) which updated the previous guidance dated August 2015. It is to the same effect:

*"Where the child is a British citizen, it will not be reasonable to expect them to leave the UK with the applicant parent or primary carer facing removal. Accordingly, where this means that the child would have to leave the UK because, in practice, the child will not, or is not likely to, continue to live in the UK with another parent or primary carer, EX.1.(a) is likely to apply.*

*In particular circumstances, it may be appropriate to refuse to grant leave to a parent or primary carer where their conduct gives rise to public interest considerations of such weight as to justify their removal, where the British citizen child could remain in the UK with another parent or alternative primary carer, who is a British citizen or settled in the UK or who has or is being granted leave to remain. The circumstances envisaged include those in which to grant leave could undermine our immigration controls, for example the applicant has committed significant or persistent criminal offences...or has a very poor immigration history, having repeatedly and deliberately breached the Immigration Rules."*

38. In looking at the best interests of the children as indicated the elder born in 2011 is a British citizen, the younger born in 2013 is a Ugandan citizen.
39. It is indisputable that it is in the best interests of both children to remain in the UK, the country where they were born and the only country of which they have knowledge. Both are now settled into school life.

40. I disagree with Ms Willocks-Briscoe that there is no good reason why the children could not remain even if the appellant left. The result would be at the very least to disrupt the relationship between him and the children. Such cannot be in the children's best interests.
41. Both mother and son have discretionary leave. The circumstances in which such was granted are unexplained. The mother's immigration history is not greatly better than that of the appellant. The fact that the younger child has been granted leave is a further indication that his best interests are to remain here. I would add in respect of the elder child that were he to leave the limited contact he has with his birth father would be endangered. Such also cannot be in his best interests.
42. This case involves the family life of a husband, wife and two young children, one a British citizen, the other with limited leave. I find it would plainly be contrary to the best interests of the children to separate that family unit. Realistically there are therefore only two options; expect mother and children to go to Uganda with the appellant or allow him to remain in accordance with the principles in section 117B(6). This is a case which must be assessed on the basis that it would be unreasonable to expect the children to leave with their mother. There is no history of criminality by the appellant. The immigration history is poor, in that the appellant overstayed on a visit visa, which was a deliberate breach of the rules, but it could not reasonably be said to be "very poor." Applying the terms of the policy, which I take to represent the Respondent's case on where the balance should be struck, I find that it would not be reasonable to expect the children to leave this country. There is accordingly no public interest in the appellant's removal and his appeal must be allowed.

### **Decision**

43. For the reasons I have given I am satisfied the decision of the First-tier Tribunal involved the making of a material error of law.
44. It is set aside and remade as follows: the appeal is allowed.

Signed

Date: 01 June 2018

Upper Tribunal Judge Conway

### **Direction Regarding Anonymity - rule 14 of the Tribunal Procedure (Upper Tribunal Rules 2008)**

Unless and until a tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.