Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: PA/09472/2018**

THE IMMIGRATION ACTS

Heard at Bradford	**Decision & Reasons Promulgated**
On 15 March 2019	**On 28 March 2019**

Before

UPPER TRIBUNAL JUDGE HEMINGWAY

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

GP
(ANONMITY DIRECTED)

Respondent

Representation:
For the Appellant: Mr McVeety (Senior Home Office Presenting Officer)
For the Respondent: Ms R Pickering (Counsel)

DECISION AND REASONS

1. This is the Secretary of State's appeal to the Upper Tribunal, brought with the permission of a judge of the First-tier Tribunal, from a decision of the First-tier Tribunal allowing the claimant's appeal against the Secretary of State's decision of 13 July 2018 refusing to grant him international protection or any leave to remain under Article 8 of the European Convention on Human Rights (ECHR). The tribunal's decision was made on 26 October 2018 following a hearing of 19 October 2018.

2. Although the claimant had originally asserted that he would be at risk on return to China at the hands of "snakeheads" no such argument was pursued before the tribunal. Nor, indeed, was it argued that the claimant met any of the requirements of the Immigration Rules. But it was argued that his appeal should succeed under Article 8 of the ECHR outside the rules on the basis of what was claimed to be family and private life in the United Kingdom (UK). As to that, the claimant had entered the UK illegally in August of 2000. He had claimed, before the tribunal, to be in a subsisting relationship with a female national of China I shall call H and to be the father of her two children. Indeed, it was not contested that he is the father of both of them. The eldest of those children was born on 17 October 2010 and the youngest on 8 May 2012. It was asserted that they all lived together as a family unit. H and the children have limited leave to remain in the UK which is due to expire on 12 July 2019.

3. The tribunal did not accept that the claimant was in a subsisting relationship with H though it did accept that he, she and the two children currently shared the same accommodation. But it thought that was primarily because of matters of convenience. It asked itself whether the claimant had a general and subsisting parental relationship with either of the two children though, in this context, it focused more upon the eldest child because that child was a "qualifying child" as the term is used in rule 276 ADE of the Immigration Rules and section 117B (6) of the Nationality, Immigration and Asylum Act 2002. What it said about that was interesting. It said this:

> "51. The issue of whether or not the appellant has a genuine and subsisting relationship with his children, and, in particular [the eldest] who is a qualifying child pursuant to paragraph 276 ADE (iv) of the Immigration Rules. I conclude on the evidence taken as a whole that it is unlikely that the appellant regards himself as having a genuine and subsisting parental relationship with his children and intends to continue to assist in their upbringing once H has finished her studies and will then be able to take employment when the children are at school. The evidence before me is that he has singularly failed to do so prior to February 2018.
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> 52. I infer that the children no doubt regard the appearance of their father in their home is a permanent feature of their future life and that they regard themselves as having had a genuine subsisting relationship with him as their father since February 2018".

4. That passage formed the subject of submissions made to me and I will comment upon it below. Having made what it did of the parental relationship issue the tribunal then explained, at paragraph 53 of its written reasons of 26 October 2017, that it thought the claimant could return to China on his own (but did not say he should be expected to do so) and make an application in China for entry clearance to come back to the UK to re-join them. Having decided that such a course of action was feasible it then went on to consider what would be proportionate with respect to Article 8. As to that, it said this:

> "54. The remaining issue to decide is, therefore, would such a course be proportionate and in the bests interests of [the children]? It is accepted by Miss Pickering that the appellant does not receive any support in this regard from the circumstances as set out in paragraph 117b. Although the children are still very young and visited China for four weeks in 2016 I infer that they will be very upset if their father is removed to China as they will regard themselves as living within a normal family setting with both their parents as at the date of the hearing, namely, 19th October 2018. This will in turn affect their clearly excellent progress at school which, in my judgment, is not in their best interests. In reaching this conclusion I have taken into account the findings in *KO (Nigeria) and others v SSHD* 24 October 2018.
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> 55. I conclude on the evidence taken as a whole that it would be disproportionate to remove the appellant to China prior to the expiry of the limited leave to remain of H and their children when the situation of the family as a whole can be reviewed again if an application is made for indefinite leave to remain. It was agreed at the hearing that the respondent will be able to restrict any LLR for the

> appellant following this decision to the expiry of H's and their children's LLR, namely, 12 July 2019".

5. To clarify, "LLR" is an abbreviation for limited leave to remain.

6. So, the tribunal allowed the appeal under Article 8 of the ECHR with a view to the claimant being granted, in consequence, a short period of limited leave to remain to expire on the same date as the leave which had been given to H and the children would expire. The decision to allow the appeal was not, however, the end of the matter as the Secretary of State applied for permission to appeal to the Upper Tribunal.

7. The Secretary of State, in seeking permission, advanced two grounds of appeal. The first was to the effect that the tribunal had not properly considered relevant matters as it was required to do in consequence of the content of section 117B of the Nationality, Immigration and Asylum Act 2002. In particular, it had failed to properly consider or reach a view as to whether under section 117B (6) it would be reasonable for the children to leave the UK. The second ground amounted to an assertion that the tribunal had reached contradictory conclusions in that it had decided, on the one hand, that it would be proportionate to expect the claimant to return to China to apply for entry clearance and it had then decided, on the other hand, that the same course of action would be disproportionate.

8. Permission having been granted the appeal was listed for a hearing before the Upper Tribunal (before me) so that consideration could be given as to whether the tribunal had erred in law and, if it had, what should flow from that. Representation was as stated above and I am grateful to each representative.

9. Mr McVeety, in addition to relying on the grounds as pleaded, spiritedly argued that the tribunal's finding that the claimant should be permitted to remain in the UK with the children was perverse given its finding that he did not regard himself as having a genuine and subsisting parental relationship with those children. Ms Pickering pointed out that that specific point had not been pleaded but argued in any event that what the tribunal had said did amount to a finding that there was a genuine and subsisting parental relationship and that, in so finding, the tribunal had been considering the position, as had been open to it, from the point of view of the children. It was also apparent that, when the written reasons were read as a whole, the tribunal had had proper regard to the section 117B criteria and to the public interest considerations contained therein. Finally, Ms Pickering argued that the tribunal had not, on a correct reading of its written reasons, made inconsistent findings with respect to the proportionality of the return to China.

10. It is necessary, I think, for me to say something about how I read the tribunal's written reasons and what I believe its reasoning to have been.

11. The tribunal did not, in my judgment, find that there was a genuine and subsisting parental relationship between the claimant and the two children. I am sure if it had made such a finding it would have clearly said so. So, I am not able to read what the tribunal had to say in that regard in the way Ms Pickering urges me to do. Given its finding that the claimant did not regard himself as having a genuine and subsisting parental relationship I do not accept it can be said that the tribunal can possibly have been finding that, nevertheless, there was one. Rather, what it was effectively saying was that there was no such relationship. Having established that, it did not treat the claimant's failure to satisfy the test contained within section 117B (6) as being determinative. Indeed, it was not required to. Success in meeting the test is determinative from a positive perspective but the converse does not necessarily apply. The tribunal was still required, as it did, to

consider matters in the round regarding proportionality and to take account of all of the other circumstances of the case. In doing that, the tribunal took into account the interests of the children. It decided that if the claimant were to depart for China as at the date of hearing before it, there would be an impact on the children because of their understandable belief that he had become as the tribunal put it "a permanent feature of their future life". It decided that a split in those circumstances would be disruptive to the children, would cause them upset, and that it would be in their best interests for such a split not to occur at that time. Further, it was not deciding, with reference to what it had to say at paragraph 53 of its written reasons, that it would be proportionate to expect the claimant to return to China and seek entry clearance. It said no such thing. It simply made the point that such would be feasible or practicable. It was not, at that stage, asking itself the proportionality question at all. It then went on to consider proportionality. It decided in looking at matters as a whole but in particular having regard to what it considered to be how the best interests of the children might be served, and bearing in mind the facility of a very limited grant of leave, that requiring the claimant to leave the UK now would be disproportionate.

12. So where does that leave us? It follows from what I have already said that I do not accept the argument in ground 2 of the written grounds to the effect that the tribunal reached conflicting findings or conclusions as to proportionality. It did not. It clearly found, when what it said is properly read and understood, that it would be disproportionate in all the circumstances to expect the claimant to return to China as at the date of the hearing before it. That disposes of ground 2.

13. As to ground 1, the tribunal's reasoning does have to be read as a whole. It was aware that the claimant did not speak English (it noted that at paragraph 22 of its written reasons). It was aware that the claimant was not financially independent (it noted that at paragraph 49 of its written reasons when it said that tax credits were being received). I do not accept that, its having made reference to those two factors, it would have then overlooked them or forgotten about them when it was deciding what was proportionate. It did not fail to reach a view as to the test contained in section 117B (6) it actually, if only by implication, resolved that point against the claimant. There is more of an argument, it seems to me, to say that it did not consider the general statement in section 117B(1) to the effect that "the maintenance of effective immigration controls is in the public interest". That was a point that was noted when permission to appeal was granted. But it did, as Ms Pickering points out, refer to paragraph 117B in general terms at paragraph 24 of its written reasons. I appreciate that it did so in a section of its written reasons where it was summarising the arguments which had been put to it. But that does, nevertheless, demonstrate that the provision was in its mind. In any event, the public interest imperative as enshrined in that section is so basic that I am not able to accept, without more, that the tribunal would have simply lost sight of it when carrying out its proportionality balancing exercise. That disposes of ground 1.

14. That leaves the further point made by Mr McVeety which I have set out above. Technically, though, that point is not before me. It was not pleaded and Mr McVeety did not seek permission to amend his grounds. Additionally, and in any event, had such an application been made and had I granted it, I would have concluded that the tribunal's finding was not perverse. I appreciate that there is an argument to say it can hardly be in the children's best interests for them to continue contact with a disinterested father until such time as that disinterest once again manifests itself. But I am not able to say it was not open to the tribunal (whilst differently constituted tribunals might have looked at the matter differently) to take the view that for the moment at least the best interests of the children did lie in their father remaining with them at least until their own immigration status was clarified.

15. In light of the above I have concluded that the tribunal did not err in law and that, accordingly, its decision shall stand.

16. This appeal to the Upper Tribunal, then, is dismissed.

Decision

The tribunal's decision did not involve the making of an error of law. Accordingly, the Secretary of State's appeal to the Upper Tribunal is dismissed.

I grant the claimant anonymity under rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 because it is appropriate given that the case involves young children. Accordingly, no report of these proceedings shall identify the claimant or any member of his family. This grant applies to all parties to the proceedings. Failure to comply may lead to contempt of court proceedings.

Signed: Dated: 26 March 2019

Upper Tribunal Judge Hemingway