Neutral Citation Number: [2020] EWCA Civ 338

Case No: C5/2019/0576

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM The Upper Tribunal (Immigration and Asylum Chamber)
Deputy Upper Tribunal Judge Manuell
PA007372018

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12/03/2020

Before:

THE SENIOR PRESIDENTOF TRIBUNALS
LORD JUSTICE BEAN
and
LADY JUSTICE KING

- -

Between:

ASFAR UDDIN	**Appellant**
- and -	
THE SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**

- -
- -

Mr Gordon Lee and Miss Amy Childs (instructed by **Duncan Lewis Solicitors**) for the **Appellant**
Mr William Irwin (instructed by **Government Legal Department**) for the **Respondent**

Hearing date: 11 December 2019

- -

Approved Judgment

The Senior President:

Introduction

1. The Appellant appeals an order of Deputy Upper Tribunal Judge Manuell of 2 October 2018 which upheld a decision of Judge Herlihy in the First-tier Tribunal of 16 July 2018 dismissing his appeal from a decision of the Secretary of State to refuse him leave to remain. On 7 June 2019 Asplin LJ granted permission to appeal.

2. By the time of the hearing before the Court of Appeal on 11 December 2019, the oral submissions of both parties had developed from their paper origins to the extent that during oral argument the appeal focussed on one issue: the correct approach to construing the engagement of the right to respect for family life in Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms ('the ECHR') in the factual circumstances that might arise out of a foster care relationship and where the person who had received or continued to receive the benefit of that care is now an adult.

Factual and Procedural Background

3. The Appellant is a national of Bangladesh who was born on 8 December 1999. His historical narrative, which is not accepted by the Secretary of State, is that he lived with his parents until the age of six but left home after he was mistreated. He says that he was found by a woman called Khuki who cared for him and brought him to London in early 2013. On any basis, on 20 February 2013, he was abandoned and was treated as a trafficked child who was placed with foster carers by the responsible local authority.

4. The Appellant made an application for asylum on 27 February 2013. The application was refused on 22 April 2013 but he was granted leave to remain as an unaccompanied asylum-seeking child until 8 June 2017. As his period of leave was expiring, the Appellant applied for further leave to remain on 18 May 2017. His application relied in part on his family life with his foster carers and their family.

5. The Secretary of State refused the Appellant leave to remain on 12 December 2017 because he a) had failed to establish a well-founded fear of persecution to qualify for

asylum, b) had failed to demonstrate a real risk of serious harm to qualify for humanitarian protection, c) had failed to demonstrate that a refusal to grant leave to remain would breach his right to respect for family life under Article 8 ECHR or would cause a real risk that he would face treatment contrary to Article 3 ECHR, and d) was not eligible for a grant of discretionary leave.

6. In his appeal to the First-tier Tribunal ('FtT'), the Appellant challenged only the decisions made in respect of his case under Articles 3 and 8 ECHR. In his subsequent appeal to the Upper Tribunal ('UT'), the Appellant was granted permission only in relation to his Article 8 case. He argued that the FtT had a) given inadequate reasons for its findings, b) defined family life too narrowly and contrary to authority and c) erred in finding that there was insufficient dependency.

7. The factual evidence relating to the Appellant's relationship with his foster family that was available to both tribunals is important and I shall return to it later in this judgment. It is important that I identify at this stage what it is and that it was not adequately considered by any decision maker. The FtT heard oral evidence given in English from both the Appellant and from the carer who I shall call his foster mother because she asserts that quality of relationship in her evidence. There were witness statements from the Appellant and his foster mother, correspondence with the British Red Cross, evidence from the Appellant's social worker and reports from his Children Services Department including, among other material, the statutory Pathway Plan made for the Appellant, as a young man leaving the care system for whom the state has continuing obligations.

8. The evidence that exists includes the following:

    i. The Appellant's view, expressed at paragraphs 6 and 12 of his witness statement, that his foster mother cares for him "like her own son", and that her children care for him "as their own sibling".

    ii. His view, expressed at paragraph 15(c) that his "only family" is his foster family and that he sees his foster mother as "family who supports me if I need help with anything."

iii. That the local authority children services department consider the Appellant to have "established a secure base through being with a foster carer who is committed to his welfare and success in life", and that the relationship is also seen by them as being a "strong protective factor" and that he was assessed as having a "close attachment to her". That is evidenced at pages 6 and 7 of the Pathway Plan and at page 10 of the same document the Appellant's relationship with his foster mother is recorded as being: "very important and key to maintaining long term stability as she knows him and is attentive to his needs".

iv. The foster mother's evidence at paragraph 5 of her statement is that the Appellant was seen as "the third child in the family", that both of her children "love the Appellant as their youngest brother", that the family as a whole "provide him with emotional support" and that the Appellant has grown a "strong bond" with her and the family.

v. The fact that he continues to live with his foster family after becoming an adult and he has not yet been assessed as being ready for "independent living" by children's services, that is, there is a clear case to be answered that he is emotionally and practically dependent on them as well as being financially dependent on the local authority.

Decision appealed

9. The FtT dismissed the Appellant's appeal primarily in respect of the asserted case on Article 3 ECHR, finding that there was no real risk that the Appellant would suffer serious harm if deported: he would be returning to a country in which he had lived for thirteen years, he could speak Bengali to a reasonable degree, was well-educated and had sufficient practical skills to care for himself. He was capable of reintegrating into Bangladesh society and able to avail himself of the country's public services.

10. While accepting that it did not directly impact upon the decision to be made, the judge expressly recorded her view that the Appellant was not a credible witness with regard to the account he gave of his history. She noted that his account was devoid of almost

any detail and that she found some of his claims to be highly implausible. She did not think that he had been wholly open and honest about his circumstances in Bangladesh. There is at least a suggestion that the conclusion to which she came on the credibility of his historical narrative affected her view of his overall credibility.

11. I note in that regard the conventional warning which judges give themselves that a person may be untruthful about one matter (in this case his history) without necessarily being untruthful about another (in this case the existence of family life with the foster mother's family), known as a 'Lucas direction' (derived in part from the judgment of the CACD in *R v Lucas* [1981] QB 720 per Lord Lane CJ at 723C). The classic formulation of the principle is said to be this: if a court concludes that a witness has lied about one matter, it does not follow that he has lied about everything. A witness may lie for many reasons, for example, out of shame, humiliation, misplaced loyalty, panic, fear, distress, confusion and emotional pressure. That is because a person's motives may be different as respects different questions. The warning is not to be found in the judgments before this court. This is perhaps a useful opportunity to emphasise that the utility of the self-direction is of general application and not limited to family and criminal cases.

12. As to Article 8, the judge understandably gave briefer consideration to this question given its relative lack of emphasis in the appeal before the FtT. She concluded that the refusal to grant leave to remain would not breach the Appellant's right to respect for family life. In doing so, she appropriately relied on the principle most often cited from the judgment of Sedley LJ in *Kugathas v Secretary of State for the Home Department* [2003] EWCA Civ 31 (which was itself a citation from the Commission's report in S *v United Kingdom* [1984] 40 DR 196), and she acknowledged that dependency was not limited to being only economic.

13. The judge did not find that the Appellant had established that his relationship with his foster family constituted family life nor was she persuaded that the Appellant had demonstrated dependency beyond normal emotional ties. She considered that the Article 8 right to respect for family life was not engaged. Accordingly, she dismissed the Appellant's appeal on human rights grounds.

14. The Upper Tribunal's analysis of the issues on the appeal is concise. I make no criticism of that, brevity is a skill. What is surprising is the lack of any analysis of the evidence which existed given the Article 8 case that was being advanced in the UT. In the event, the UT found that there was no error of law in the FtT's conclusion that family life did not exist between the Appellant and his foster family on the facts of this case. The deputy Judge was sufficiently unimpressed that he said that the grant of permission to appeal to the UT was "generous". With respect, I disagree with him. An analysis of the evidence would at least have demonstrated the *prima facie* factual matters that were in issue on the appeal.

15. The deputy Judge also held that the FtT's determination was carefully prepared by a very experienced judge who made a meticulous and balanced assessment of the evidence in the round. I entirely concur with the import of his observation in so far as it recognises that tribunal judges are specialist judges who are expected to know the expert materials in their field such that an appellate court should have appropriate regard for that specialist experience. That is quite different from an implication that there is a factor to be considered in an appeal that experienced judges should not be expected to make a mistake. In commenting that it "would have been an elementary and unlikely error for any judge in a jurisdiction which revolves around Article 8 ECHR issues" he was applying an assumption which is an inappropriate approach to an appeal.

16. Finally, the deputy Judge held that it was "almost too obvious to require mention that the Appellant's foster carers were appointed by the local authority, who supervise and pay them. The connection is not a voluntary one, however successful it may be, but a commercial arrangement reached so that the local authority could discharge its statutory duties to the Appellant. The main financial support comes from the state, not the foster carers." From this the deputy Judge reasoned that "the judge was entitled to find that there was no emotional dependency, particularly as the Appellant had not been found to be credible."

17. That elided the credibility issues to which I have previously referred without an analysis of the evidence and also confined the analysis of family life in foster care to a narrow concept of financial dependency. As I shall describe, it was regrettably wrong.

Grounds of appeal

18. The first question that is to be decided by this court is whether the evidence is sufficient for a factual finding to have been made that family life exists between the Appellant and his foster carers and their family. If it is and it was not analysed, then that question remains to be decided and both tribunals will have erred in law in omitting to have considered the evidence on what became the only remaining issue before the UT and/or by failing to reason their conclusions about that issue.

19. The FtT, and in turn the UT, failed to provide reasons for the finding that family life did not exist between the Appellant and his foster carers and family. If the evidence that I have described and in particular the uncontested nature of the relationship between the Appellant and his foster family is to be rejected, the tribunal needs to say so and to reason why. It was given by at least three separate witnesses who on paper are consistent. It is regrettable that the Appellant's social worker failed to attend the FtT hearing. He should not have excused himself without the tribunal's permission. That said, his evidence was not contradicted by anyone. Some of the material that I have identified comes from those who have statutory duties to make records about the Appellant and his carers. The conclusions that can be read on their pages were important given the statutory duties that were engaged.

20. Mr Irwin, in submissions made on behalf of the Secretary of State, appropriately submits that it is a material factor as regards this court's assessment of the FtT's consideration of Article 8 that the evidence to which I have referred was not further developed in submissions in the FtT. Any court must have sympathy with the problem that he describes. The evidence is there but the appeal majors on other points. That is an explanation but not an adequate reason for important evidence being missed. I do not criticise either tribunal but in the UT the issue was specifically engaged and was the only issue on which the appeal turned.

21. The second question is whether, if the facts described were established to the satisfaction of a tribunal, they were sufficient to engage the Article 8 right to respect for family life. That might seem self-evident, and the Appellant contends for that

consequence, but the Secretary of State has made firm submissions to the effect that there is a qualitative difference in principle between the relationships of members of birth families and those that develop in foster care. The submissions, in their clarity and content, had the appearance of the description of a practice towards unaccompanied asylum-seeking children who are placed in foster care. The court is accordingly required to consider whether it is right in law to treat children who are placed with and cared for by foster carers differently from children who are placed with and cared for by their birth families.

22. The Secretary of State submitted that foster care relationships were a "special case". It was submitted that an appellant who is or was a member of a foster family should have to *prove* the existence of a family life in a way that a birth member of a "natural" family, to use the language of the Secretary of State, would not. This proposition, it was argued, is founded in the authorities that have followed on from *Kugathas*, all of which, it was said, are concerned with and limited to birth family relationships rather than relationships that might arise out of foster care. The Secretary of State's submission is that in birth families and those families where relationships benefit from the status of adoption, the "blood link" or the fact of adoption goes deeper than the "mechanics of care" that might exist and hence arise out of foster care. That leads, it is submitted, to a starting presumption of family life in a 'natural' family that does not arise in the context of foster care.

23. Counsel for the Appellant, Mr Lee, contrastingly, argues that no significance at all is to be given to the formal status of foster care. To describe foster care as a 'commercial arrangement', and to give pre-emptive weight to this starting point (as the deputy Judge in the UT did), is said to be reductive and to add nothing to the material analysis. The Appellant submits that, in having to prove the existence of family life before a tribunal, there should be no divergence in principle between the way relationships that exist in a birth family and those which exist in a foster family are treated. The process of identifying family life depends on the substance of the relationship and not its form: it is a matter of fact-finding in every case. As to which, the Appellant submitted that great if not determinative weight is to be placed on the fact of cohabitation, particularly where a young person continues to live with the foster family after reaching the age of majority.

Discussion:

24. As I have foreshadowed, neither the FtT nor the UT analysed the uncontradicted factual evidence that I have summarised at [7] and [8] above. For the reasons set out at [17] to [19] above, the factual conclusion is unsustainable and must be set aside. In summary, that is because a) the *prima facie* evidence was not referred to or analysed, b) the conclusion that family life did not exist was not reasoned, and c) the UT assumed that the foster care relationship was commercial and that this fact was determinative of dependency.

25. This appeal goes further than questions of fact alone. In deference to the submissions we have received, it is appropriate to examine the issue of principle that arose. The differentiating significance to be accorded to foster care when determining whether a relationship between two adults engages an Article 8 right to respect for family life as asserted by the Secretary of State did not apparently arise in the FtT. It first arose in the UT where the deputy Judge introduced the notion that the commerciality and state-incentivised nature of the foster care relationship must "obviously" have been in the mind of the FtT in coming to the conclusion that there was no emotional dependency. Underlying that assumption was an issue of principle namely whether the UT's approach to the establishment of family life in foster care was wrong in law because it was too narrow and not in accordance with authority.

26. *Kugathas* describes the requirements for proving family life between adults in the context of immigration control. At paragraph [14], Sedley LJ cited with approval the report of the Commission in *S v United Kingdom* at [198]:

> "Generally, the protection of family life under Article 8 involves cohabiting dependents, such as parents and their dependent, minor children. Whether it extends to other relationships depends on the circumstances of the particular case. Relationships between adults … would not necessarily acquire the protection of Article 8 of the Convention without evidence of further elements of dependency, involving more than the normal emotional ties."

27. At paragraph [16], the court referred to other European authorities which point to the enduring relevance of the passage above:

> "In *Marckx v Belgium* [1979] 2 EHRR 330, a decision of the full Court, at paragraph 31 the adjectives "real" and "normal" were used to characterise family life if it was to come within Article 8. In *Abdulaziz, Cabales and Balkandali v United Kingdom* [1985] 7 EHRR 471 paragraph 63, again a decision of the Court, the phrase "committed relationship" was used. In *Beljoudi v France* [1992] 14 EHRR 801, a decision of the Commission which went on to be upheld by the Court, at paragraph 55 the phrase "real and effective family ties" was used."

28. Importantly, at paragraph [17], the court considered whether the authorities describe a requirement of dependency in order to establish family life. Sedley LJ made it clear that this is right in the economic sense. However, he continued:

> "But if dependency is read down as meaning "support", in the personal sense, and if one adds, echoing the Strasbourg jurisprudence, "real" or "committed" or "effective" to the word "support", then it represents in my view the irreducible minimum of what family life implies."

29. The court added, for completeness, at paragraph [18], that it is probable that the natural tie between parent and infant is a "special case" which may in some cases supersede any need for a demonstrable measure of support.

30. What might then be the material factors that constitute the irreducible minimum of what constitutes family life? At paragraph [24] of *Kugathas* Arden LJ provides instructive assistance:

> "There is no presumption that a person has a family life, even with the members of a person's immediate family. The court has to scrutinise the relevant factors. Such factors include identifying who are the near relatives of the appellant, the nature of the links between them and the appellant, the age of the appellant, where and with whom he has resided in the past, and the forms of contact he

> has maintained with the other members of the family with whom he claims to have a family life."

From this, Arden LJ reasons at paragraph [25] that:

> "Because there is no presumption of family life, in my judgment a family life is not established between an adult child and his surviving parent or other siblings unless something more exists than normal emotional ties … Such ties might exist if the appellant were dependent on his family or vice versa."

31. Dependency, in the *Kugathas* sense, is accordingly not a term of art. It is a question of fact, a matter of substance not form. The irreducible minimum of what family life implies remains that which Sedley LJ described as being whether support is real or effective or committed.

32. Subsequent case law has built upon but not detracted from *Kugathas*. In *Ghising* [2012] UKUT 00160 (IAC), Lang J sitting with Upper Tribunal Judge Jordan in the UT considered the authorities since *Kugathas*. They observed that family life between adult children and their birth parents will readily be found without evidence of exceptional dependence. In so far as it has been suggested that *Kugathas* had ever described a rigid test of exceptional dependency, this was dispelled and I respectfully agree with their conclusion that each case is fact sensitive.

33. *Kugathas* was a case in which the appellant had, many years previously, cohabited with his birth parents. This is so with many of the other case examples that counsel has drawn to our attention. The Secretary of State submits that this fact is an underlying assumption that denotes the true ambit of the authorities: namely, that the principle as described is a presumption limited to the formal relationship of a birth family.

34. The Secretary of State goes further and submits that foster care is a "special category", in which it is incumbent upon an appellant to prove family life in a way that would otherwise be presumed in a birth family. I can find no support for this proposition in the case law. The principles in *Kugathas,* as described in the judgments to which I have referred, are of general application. I can discern no intention, articulated or implied,

to limit the test of real or effective or committed support to birth families. Rather, at paragraph [18] of *Kugathas* the court describes the special case which is the converse of that asserted by the Secretary of State, namely that in some cases a natural tie between parent and infant may displace the principle of general application that a family life will need to be proved based on the substance of the relationship asserted.

35. The next question is whether the attainment of majority, that is to say the point at which a young person reaches his or her 18th birthday, has any relevant effect upon the existence of a family life. That question is settled. In *Singh v Secretary of State for the Home Department* [2015] EWCA Civ 630, [2016] ImmAR 1, Sir Stanley Burnton, with whom the rest of the court agreed, held at paragraph [24] that:

> "A young adult living with his parents or siblings will normally have a family life to be respected under Article 8. A child enjoying a family life with his parents does not suddenly cease to have a family life as he turns 18 years of age. On the other hand, a young adult living independently of his parents may well not have a family life for the purposes of Article 8."

36. The existence of family life after a young person has achieved his or her majority is a question of fact. There is no presumption, either positive or negative, for the purposes of Article 8. Continued cohabitation will be a highly material factor to be taken into account and while not determinative, a young adult still cohabiting with a family beyond the attainment of majority is likely to be indicative of the continued bonds of effective, real or committed support that underpin a family life.

37. In so far as it is necessary to support the domestic case law that is binding on this court, the principle is also well embedded in ECHR case law. In *Anayo v Germany* (2012) 55 EHRR 5, [2011] 1 FLR 1883 at [56] the Strasbourg court determined that "as a rule, cohabitation is a requirement for a relationship amounting to family life".

38. In *Kopf and Liberda v Austria* App no. 1598/06 [2012] 1 FCR 526 the ECHR reiterated at [35] the notion expressed in *Anayo* that "family life' under Article 8 is not confined to marriage-based relationships and "may encompass other de facto 'family' ties." The court continued:

> "The existence or non-existence of 'family life' for the purposes of art 8 is essentially a question of fact depending on the real existence in practice of close personal ties (see *K v Finland* [2001] 2 FCR 673, [2001] 2 FLR 707 at para 150). Although, as a rule, cohabitation may be a requirement for such a relationship, exceptionally other factors may also serve to demonstrate that a relationship has sufficient constancy to create de facto 'family ties' (see *Kroon v Netherlands* (1994) 19 EHRR 263 at para 30)."

On the facts of *Kopf*, it was the applicant foster parents' "genuine concern for [the child's] well-being and that an emotional link between [the child] and the applicants similar to the one between parents and children had started to develop" that grounded the court's finding, at [37], that the relationship "falls within the notion of family life within the meaning of art 8(1)."

39. Absent a policy justification to the contrary that is appropriately promulgated and reasoned, I can see no basis in law for the purposes of Article 8 for a difference in principle between a relationship that is one that has arisen out of a foster care arrangement or from birth. The starting point for the analysis of a court or tribunal is accordingly not different. The tribunal's task is to assess whether the family life that existed in the run up to a child's attainment of majority continues to exist afterwards i.e. based upon the factual findings: what is the substance of the relationship. The suggestion that the formal characterisation of a foster family as a non-voluntary, commercial relationship should impact on or alter the court's inquiry and analysis of the existence of family life goes against authority to the effect that it is the substance and not the form of the relationship that grounds a family life.

40. Accordingly, the following principles can be described from the authorities:

    i. The test for the establishment of Article 8 family life in the *Kugathas* sense is one of effective, real or committed support. There is no requirement to prove exceptional dependency.

ii. The test for family life within the foster care context is no different to that of birth families: the court or tribunal looks to the substance of the relationship and no significant determinative weight is to be given to the formal commerciality of a foster arrangement. It is simply a factual question to be considered, if relevant, alongside all others.

iii. The continued existence of family life after the attainment of majority is also a relevant question of fact. No negative inference should be drawn from the mere fact of the attainment of majority, while continuing cohabitation after adulthood will be suggestive of ongoing real, effective or committed support which is the hallmark of a family life.

41. The un-contradicted Article 8 facts in this case are that the Appellant was an orphaned young man, abandoned on the streets of London at the age of 13 with no known family. He has been brought up and cared for by a foster family who are committed to him as if he were a child of the family's. They are paid by the local authority children's services department. That department independently considers the foster family to be committed to his welfare and success in life. There is a Pathway Plan in place for him that provides for his continued cohabitation with the foster family until at least the age of 21, a settlement that both the Appellant and his foster family jointly desire. It may be significant that through the support, protection and upbringing of his foster family, the Appellant has transformed from a destitute thirteen-year-old who spoke no English, to an accomplished young man engaged in his community and education. It must now be for a new tribunal to consider all of the relevant evidence afresh and come to a conclusion about the Appellant's family life.

42. For the reasons I have described I would allow this appeal and set aside the orders of the FtT and the UT. I would remit the case to be re-decided by a new constitution of the FtT.

Lady Justice King:

43. I agree.

Lord Justice Bean:

44. I also agree.