Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/18404/2019

THE IMMIGRATION ACTS

Heard at Field House (via Skype)	**Decision & Reasons Promulgated**
On 1 December 2020	**On 16 December 2020**

Before

UPPER TRIBUNAL JUDGE BLUNDELL

Between

M A M
(ANONYMITY DIRECTION MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Spurling, instructed by City Heights Solicitors
For the Respondent: Mr Whitwell, a Senior Presenting Officer

DECISION AND REASONS

1. The appellant is a Bangladeshi national who was born on 10 January 1987. He appeals, with permission granted by Judge Pooler, against a decision which was issued by Judge O'Keeffe on 5 February 2020, dismissing his appeal against the respondent's refusal of his human rights claim.

Background

2. The appellant entered the UK in 2009. He held entry clearance as a student, which was valid until 2011. He subsequently secured an extension of his leave to enter until May 2014. He applied for further leave in that capacity but his application was refused in June 2015 and the resulting appeal was dismissed in January 2016. The appellant

exhausted his appeal rights in August 2016. He subsequently made three applications for residence cards under the EEA Regulations 2016. Each of those three applications were refused, with the final refusal being in the summer of 2017.

3. Later that year, in December 2017, the appellant met a British citizen named [PB] at a party. They had been acquainted before then but matters moved towards a relationship from this point. Ms [B] ("the sponsor") was separated from her husband at this stage. She and her husband had three children together but they had separated in the summer of 2017. There were allegations of domestic violence. The appellant and the sponsor's relationship developed. She divorced her husband on 17 July 2019 and, on the same day, she and the appellant undertook an Islamic form of marriage. A civil marriage ceremony took place on 11 November 2019. In the meantime, on 30 July 2019, the appellant had applied for leave to remain as Ms [B]'s partner. The application was refused on 29 October 2019.

4. The respondent was not satisfied that the appellant was the sponsor's partner, as that term is defined at Gen 1.2 of Appendix FM of the Immigration Rules. They were not married according to law and they had not cohabited for two years. The appellant was unable to meet the Immigration Status Requirement for the Five Year Route because he was an overstayer. He was not able to rely on paragraph EX1 because he was not the sponsor's partner. He did not meet the requirements for a grant of leave to remain on Private Life grounds and it was not accepted by the respondent that there were 'exceptional circumstances' such that it was appropriate to grant leave to remain outside the Immigration Rules.

5. At the hearing before the FtT, the focus was narrowed by Mr Spurling, who represented the appellant then as he does now. The primary issue which the judge was invited to consider was whether the appellant enjoyed a genuine and subsisting parental relationship with the sponsor's children so as to satisfy the condition precedent in s117B(6). It was submitted that the appellant did enjoy such a relationship with the two children and that it would be unreasonable to expect them to leave the United Kingdom. It was submitted that the satisfaction of s117B(6) was determinative of the proportionality assessment the judge was required to undertake and that the appeal fell to be allowed on Article 8 ECHR grounds accordingly.

6. The judge concluded that the appellant did not enjoy a qualifying relationship with these children. She went on, in comparatively (but justifiably) short form to find that the appellant could not meet the requirements of the Immigration Rules and that his expulsion from the United Kingdom would not be in breach of Article 8 ECHR.

The Appeal to the Upper Tribunal

7. There are three grounds of appeal, each of which takes the judge's assessment of the first question posed by s117B(6) as its target. It is submitted that the judge misdirected herself on the facts in two respects and that she also misdirected herself in law.

8. In his grounds of appeal and concise oral submissions, Mr Spurling submitted as follows. His first complaint is that the judge erred at [21] when she considered that the appellant had only had a 'comparatively short period of time in which to establish a genuine and subsisting parental relationship'. The judge had noted that the appellant and the sponsor had been in a relationship since 2017 but that they only got married (under Islamic law) in July 2019, from which point they started to cohabit. The judge had based her conclusion that there had only been a comparatively short period on the latter period but she had erred, Mr Spurling submitted, in excluding the former period from her consideration. The appellant had developed a relationship with the children even whilst he and the sponsor were not cohabiting, and the judge had erred in leaving that out of account. The judge had stated that the appellant had 'helped with day-to-day chores' before they started to cohabit but this was unduly vague and the reality was that they had been in a relationship which was known to the children. Considering the ages of the children, the period of around eighteen months could not properly be described as comparatively short.

9. The second ground took something said by the judge at [29] of her decision as its focus. She had noted in that paragraph that the children called the appellant 'Dad' in Bengali and that they called their biological father 'Dad' in English. In fact, the evidence was that both of the children now call the appellant Abba ("Dad" in Bengali). The older of the two children calls her father 'Dad' in English, whereas the younger child calls him 'Cousin Dad'. Mr Spurling also criticised the judge's observation that she was not persuaded that this added much to her analysis, submitting that this was wrong and that the name by which the appellant was known to the children was obviously probative of the relationship. A discrete point was that the judge had failed to make a finding on the evidence that the appellant had attended parents' meetings and hospital visits.

10. The third ground is that the judge had confused the test she was to apply. Whilst she had cited s117B(6) and had, on occasion, referred to whether there was a genuine and subsisting parental relationship between the appellant and the children, other tests had also appeared in her analysis. She had referred, on four occasions, to considering whether there was a 'genuine and subsisting relationship' between the appellant and the children and she had also considered whether the appellant had parental responsibility for the children. These were not the tests.

11. Mr Spurling referred to R (RK) v SSHD [2016] UKUT 31 (IAC); [2016] Imm AR 527, in which UTJ Grubb had given guidance on the test in s117B(6). He noted that there were obiter observations in that decision regarding the position of step-parents such as the appellant. There was nothing to prevent three people having a genuine and subsisting parental relationship with a child and the judge had erred in treating the ongoing involvement of the children's father as precluding any possibility of the appellant meeting s117B(6).

12. Mr Spurling was not aware of the decision of the Court of Appeal in AB (Jamaica) & AO (Nigeria) v SSHD [2019] EWCA Civ 661; [2019] 1 WLR 4541. I gave him an opportunity to consider that decision. Having done so, he submitted that it emphasised the highly fact-specific enquiry required in circumstances such as the present and that it said nothing which suggested that UTJ Grubb had been wrong in his obiter observations at [45] of RK. The test was not, he submitted a term of art. It had been irrational for the judge to treat the relationship in this case as anything other than a parental one.

13. Mr Whitwell acknowledged that the judge had used loose language on more than one occasion, omitting as she had the word 'parental' from the test she applied. Like Mr Spurling, however, he emphasised that the test was not a term of art and he submitted that it was quite clear from the remainder of the decision that the judge had had the proper test firmly in mind. RK had been cited to her and was considered in her decision, as was the respondent's guidance. Mr Spurling had been wrong to cite the judge's reference to 'parental responsibility', at [30], in support of his argument; it was quite clear that the judge's assessment in that part of her decision was focused on a different question. The reality was that the judge had taken all relevant matters into account and had come to a conclusion which was open to her and with which the Upper Tribunal was not entitled to interfere.

14. In response, Mr Spurling submitted that the judge had evidently confused two separate tests in her decision. The repeated reference to whether there was a 'genuine and subsisting relationship' showed that the judge had not applied the test in s117B(6), which was intentionally framed differently. Even if the judge's decision was read as a whole, as it should be, the judge was clearly applying a test of parental responsibility rather than a test of parental relationship.

15. At the conclusion of the submissions, I reserved my decision. I indicated, however, that I agreed with the advocates in relation to the relief which should follow if I concluded that the decision of the FtT should be set aside; remittal de novo would be the proper course in those circumstances.

Analysis

16. Although it is the third and final of Mr Spurling's grounds, it is appropriate to consider at the outset whether the judge misdirected herself in law in failing to apply a test of whether the appellant has a genuine and subsisting parental relationship with the sponsor's children IH (10 at the date of the judge's decision) and IQ (3 at the date of the judge's decision). The submission is made in reliance on five parts of the judge's decision. At [21], [29], [32] and [36], the judge made findings on whether the appellant had a 'genuine and subsisting relationship' with the children. And, at [30], she stated that the children's father 'continues to exercise his parental responsibility' for the children. Mr Spurling submits that these references show that the judge was not focused upon the statutory language in s117B(6) and that she applied the wrong test.

17. I consider it quite clear, with respect to Mr Spurling, that the omission of the word 'parental' in [21], [29], [32] and [36] of the judge's decision was merely infelicitous and is not an indication that she applied the wrong test. So much is clear from the remainder of the judge's decision. At [14], she noted that she had a skeleton argument from Mr Spurling. That skeleton argument made reference s117B(6) itself; to UTJ Grubb's decision in RK; and to the respondent's policy guidance entitled *Family Policy: Family life (as a partner or parent) private life and exceptional circumstances, Version 5.* The focus in the skeleton argument and the oral submissions is replicated in the judge's decision. At [18], she set out s117B as a whole. At [20], she focused on the statutory question of whether there was 'a genuine and subsisting relationship with the children of his partner' and she drew on the relevant section of the respondent's guidance. Having referred to the facts, and to certain difficulties with the evidence, the judge turned to RK and noted that 'it was not contentious that more than 2 persons may be in a parental relationship with a child. At [32], she concluded that s117B(6) did not apply.

18. I note that there are references to a 'genuine and subsisting relationship' at various stages of the decision but the question, it seems to me, is whether this was merely 'loose language', as submitted by the respondent before me, or whether it is a real indication that the judge was not aware of the test she was to apply. Given the repeated references to the statute and to relevant authority and policy, I am wholly unable to accept Mr Spurling's submission that the judge misdirected herself in law. It is regrettable that she omitted the word 'parental' but she was clearly focused, throughout the decision, on the correct test.

19. As for Mr Spurling's point that the judge erred in referring, at [30], to 'parental responsibility', it is important to assess that observation in its proper context:

> [30] Drawing those various strands together, the appellant does live with the children and obviously sees them regularly. I am satisfied that he is willing and able to look after the children. Whilst I am sure that he is helpful to Ms [B] and shared some of the burden of day-to-day childcare, there is simply no evidence that he is involved in any of the decisions that directly affect these children. I was not provided with evidence of a single decision that he has made for the children. On the evidence before me I find that it is more likely than not that <u>the children's own father continues to exercise his parental responsibility for them</u> and continues to maintain an active genuine and subsisting parental relationship with them. I find that the appellant has not demonstrated that he is either the primary or secondary carer for these children. [emphasis added]

20. I accept Ms Whitwell's submission that there is nothing in this paragraph which suggests that the judge took her eye off the test she should have been applying. It was relevant to the overall analysis conducted by her that the children's father continues to have parental

responsibility for them and that he continues to have an active role in their lives. Reading this paragraph on its own and reading the decision as a whole, there is no reason to think that the judge applied a test of whether the appellant has parental responsibility for the children, or that she thought that the ongoing role of the father precluded the appellant from satisfying s117B(6). Indeed, her citation of UTJ Grubb's decision in RK, in [31] referred expressly to the acceptance in that case that more than two people may be in a parental relationship with a child.

21. I do not accept, in the circumstances, that the third ground is made out.

22. Nor do I accept Mr Spurling's submission that the judge erred as contended in the first ground of appeal. The specific target of this ground is an observation made by the judge in [21] of her decision:

> The appellant and his wife began their relationship in 2017. They married in July 2019 and began living together from that date. I was told that before that date, he had helped caring for the children. I have no doubt that he has helped with day to day chores and I was provided with a number of photographs which show him with the children. I do take into account however, that the appellant has only been living with Ms Begam and her children for just over 6 months. That is a comparatively short period of time to establish a genuine and subsisting relationship with these children.

23. Nothing in that paragraph is said by Mr Spurling to be factually wrong, as such, but he does submit that the judge overlooked aspects of the case advanced and that her reasoning process was legally flawed as a result. He submits that the finding that the appellant had helped with 'day to day chores' is rather vague, and overlooks what was said to be the appellant's gradual inclusion as part of the family unit before the date on which they began to cohabit. To advance that complaint is to ignore the dearth of evidence in support of it, however. The judge's finding about the appellant's role in the household before July 2019 was vague because the evidence about the appellant's role was vague. There is very little, if anything, focused on that particular period in the statements made by the appellant and the sponsor before the FtT. Nor is there anything of note in the statement made by the sponsor's sister. Those statements are focused on the position at the date of the hearing before the FtT and provide no real support for the contention that the relationship with the children had developed in any meaningful way before the Islamic marriage and cohabitation commencing, six months before the hearing in the FtT.

24. Nor is it established that the judge erred in failing to take any account of the ages of the children in this part of her assessment. She was plainly cognisant of the ages of the children, and she was not required expressly to state in her reasoning that a genuine and subsisting parental relationship may be formed very quickly where the children are young.

25. I do not consider the judge to have fallen into error as contended in ground one.

26. Mr Spurling then contends that the judge erred in her consideration of the evidence about the names used by IH and IQ to refer to the appellant and their biological father. There are said to be two errors of law. The first is said to be an error on the part of the judge in observing that the names used did not 'add much to a decision as to whether or not he has a genuine and subsisting relationship with them', at [29]. Mr Spurling submits that this was irrational, and that the names used by the children for the appellant and their father were necessarily probative of the nature of the relationship. I am unable to accept that submission. The judge's observation was, to my mind, necessarily correct. Children generally – and young children in particular – will call adults by the names they are given. There was no evidence before the judge, as I understand it, that one or both children had taken it upon themselves to refer to the appellant as 'Abba', which means 'Dad' in Bengali. The natural basis upon which to proceed was that the children called the appellant what they had been told to call him, and that was evidently the logic behind the judge's observation that the names used were not particularly probative of the substance of the relationship.

27. Mr Spurling also submits that the evidence was more nuanced than the judge appreciated in her summary. At [6] of the grounds of appeal, he submits that:

> the appellant said that the older of the two children who live with him used to call him Mama ("Uncle") and now calls him Abba ("Dad"), while the youngest has always called him Abba. The older one calls her father "Dad" (in English) while the youngest one calls him "Cousin-Dad".

28. Even if the evidence was rather more nuanced than the judge recorded, however, the fact remains that the judge was entitled, in her consideration of the evidence as a whole, to conclude that the names used where not particularly probative of the nature of the relationship. There is no legal error disclosed by these points; this is merely a disagreement with the judge's evaluation of the facts.

29. The final, discrete point, disclosed by ground two is that the judge is said to have failed to make any findings regarding the appellant's attendance at school parents' events and hospital visits. But the judge recorded that evidence at [11] of her decision and there is no reason to think that she left it out of account in her holistic evaluation of the relationship.

30. Although it is unfortunate that the judge omitted the word 'parental' at various parts of her analysis, it is quite clear that she was cognisant of the statutory language and of the interpretation of that language in relevant authority and Home Office policy. The assessment she undertook followed the structure she was invited to adopt in Mr Spurling's skeleton argument. She considered the statutory language at [18]. She summarised the undisputed aspects of the relationship at

[19]. She recounted the factors which were said by the respondent's policy to be relevant to the assessment of whether there was a genuine and subsisting parental relationship between the appellant and his step-children at [20]. She then considered those factors and made findings of fact about the relationship in the ensuing twelve paragraphs. The matters which she weighed for and against the satisfaction of the statutory test featured properly in that analysis and the conclusion she reached on the evidence as a whole was open to her as a matter of law. The challenges advanced by Mr Spurling amount, with respect, to nothing more than an invitation to disagree with findings of fact which were properly open to the judge. She was entitled to conclude that the appellant's comparatively short involvement in the lives of these children had not reached the point at which it could properly be described as a parental relationship.

Postcript

31. It is necessary to make one final observation. As recounted at the start of this decision, the respondent held that the appellant was not the sponsor's partner (as defined) and that he could not avail himself of paragraph EX1 of Appendix FM as a result. By the time of the hearing before the FtT, however, the appellant and the sponsor were married according to UK law and she was undeniably his partner, as defined in Gen 1.2. Subject to the considerations in s85(5), of the Nationality, Immigration and Asylum Act 2002, the appellant would have been entitled to argue that he met the requirements of the Ten Year Route in Appendix FM. The argument, put simply, could have been that he was in a genuine and subsisting relationship with his wife and that there were insurmountable obstacles to her relocating to Bangladesh because her children continued to have a relationship with her and their father. That argument would not have depended upon the appellant having a parental (or any) relationship with his step-children. The point was not pursued before the FtT, however, and could not have been taken before me as a result. The appellant might nevertheless wish to seek legal advice on the pursuit of such a claim under paragraph 353 of the Immigration Rules, particularly in circumstances in which the essential facts upon which that argument depends do not appear to be in dispute.

Notice of Decision

The decision of the FtT did not involve the making of an error of law. The appeal to the Upper Tribunal is accordingly dismissed and the decision of Judge O'Keefe shall stand.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

The First-tier Tribunal made an anonymity order which encompassed the appellant and his whole family. Having regard to the principle of open justice, I respectfully consider that order to have been too wide. There is no reason why the appellant and his partner should not be identified. Insofar as the FtT was concerned to protect the identity of the appellant's partner's

children, however, I continue that order in the following terms. No report of these proceedings shall directly or indirectly identify the appellant's partner's children other than by the initials used in the judgment. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

M.J.Blundell

Judge of the Upper Tribunal
Immigration and Asylum Chamber

12 January 2021