IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-000479
First-tier Tribunal Nos:
HU/51150/2022
IA/01807/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 21 May 2023

Before

UPPER TRIBUNAL JUDGE RIMINGTON

Between

The Secretary of State for the Home Department

Appellant

and

A A
(ANONYMITY ORDER MADE)

Respondent

Representation:
For the Appellant: Mr Murghal, instructed by Calices Solicitors
For the Respondent: Mr S Walker, Home Office Presenting Officer

Heard at Field House on 20 April 2023

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the appellant and any member of his family is granted anonymity. The order is imposed owing to the sensitive details included in the decision.

No-one shall publish or reveal any information, including the name or address of the appellant, likely to lead members of the public to identify the appellant and any member of his family. Failure to comply with this order could amount to a contempt of court.

DECISION AND REASONS

1. The Secretary of State appeals with permission against the decision of First-tier Tribunal Judge Symes who allowed the appellant's appeal on human rights grounds against the refusal of the Secretary of State dated 13 December 2021.

2. The application for permission was made by the Secretary of State but nonetheless, I shall refer to the parties as they were described in the First-tier Tribunal, that is Mr AA as the appellant and the Secretary of State as the respondent.

3. The appellant is a citizen of Mauritius and his application had been based on his relationship with a British citizen LW ("the sponsor"), who had no links with Mauritius. The application was accompanied by various supporting letters from friends. The sponsor has four children, three of whom live with her and the appellant, SC born on 26 October 1993, SP born on 13 March 2008, JP born on 21 August 2009 and ShP born on 1 April 2015.

4. There had been a previous Tribunal determination in 2019 where the judge concluded that the appellant had truly believed himself entitled to reside in the UK, given his evidence on the background to the issue of a previous mistakenly granted EEA residence certificate. However, he had at that point limited ties in the UK and could be reasonably expected to re-establish himself in Mauritius and the appeal was dismissed.

5. In this appeal the appellant's evidence was that he met the sponsor in 2009 and they had been friends, but had only formed a relationship in December 2020. They had moved in together during a time when the sponsor had continued to experience chemotherapy for breast cancer. There was evidence given that the appellant was "a wonderful father to them [the children]". He gave evidence that he stayed clear of the arrangements and the contact the children had with their natural father. He was always there for the children when they needed him.

6. The judge at paragraph 23 stated as follows:

> *"23. Given that finding, and the consistency and the plausibility of the account of the couple's family life with the Sponsor's four children, I must inevitably find that the Appellant takes a genuine parental role given his active participation in the childrens' upbringing summarised above, ranging from participating in meals to taking them for their regular activities."*

The judge ultimately allowed the appeal, stating:

> *"25. There are three minor British Citizen children within the family unit (S, J and Sh, having been born in the UK to a mother who obtained British citizenship herself in 2007 and themselves born in 2008, 2009 and 2015). So the question is whether their hypothetical relocation to Mauritius would be unreasonable. That represents an easier test to satisfy than the "insurmountable obstacles" for a partner alone.*
>
> *26. It seems to me that to uproot three British citizen children from their school, bearing in mind that the two older ones are at a stage where*

they will have ties to friends and will have made real progress in their studies (having spent more than seven years in school), would indeed be unreasonable. Additionally their mother would be removed from her own broader support network (she is clearly close to her adult daughter S) and from the cancer treatment recovery regime which she has relied on for some years, and which has several years still to go. This would foreseeably cause her real distress and would prejudice the childrens' upbringing. The Statutory Guidance issued in November 2009 Every Child Matters: Change for Children specifies that safeguarding and promoting the welfare of children shall mean:- "preventing impairment of children's health or development (where health means 'physical or mental health' and development means 'physical, intellectual, emotional, social or behavioural development') … undertaking that role so as to enable those children to have optimum life chances and to enter adulthood successfully." Patently the childrens' optimum life chances could be significantly damaged were they to be uprooted from the family home where they are established in school and where their mother has a supportive daughter and important medical regime. The authorities remind us that one must have regard to the "real world" immigration situation, but this is not a case where both parties with a genuine parental relationship are familiar with life in Mauritius: the Sponsor has no ancestral or family connection there whatsoever. 8

27. *It is also important to have regard to the statutory factors under s117B NIAA 2002. The Appellant speaks fluent English and he is supported by the Sponsor (who earns more than the Appendix FM target income) such as to be financially independent; so those factors are neutral. His residence is precarious, and in fact at the higher end of the precariousness scale given he originally overstayed his visa and has already lost an immigration appeal. On the other hand that history arose before his long-standing friendship with the Appellant developed into a genuine and subsisting permanent relationship between loving partners in which the best interests of three British citizen children are of central importance. In fact, whilst private life during a period of precarious residence and family life developed during unlawful residence should generally be given little weight, where qualifying children are involved whose departure from the UK is judicially assessed as unreasonable, s117B(6) does not require a person's removal outside of the deportation context."*

The Grounds of Appeal

7. The Secretary of State's grounds of permission to appeal asserted that the judge made a material misdirection of law on a material matter.

8. At [23] of the determination, the judge found that the appellant had a genuine parental relationship with his partner's 3 minor children.

9. At [16] of the determination the FTTJ records the sponsor's evidence was that the younger children saw their birth father two or three times a week._

10. Reliance was placed on the findings of the Upper Tribunal in **Ortega (remittal; bias; parental relationship)** [2018] UKUT 00298 (IAC) which at head note 3 stated the following (emphasis added)

> *"As stated in paragraph 44 of R (on the application of RK) v Secretary of State for the Home Department (Section 117B(6): "parental relationship") IJR [2016] UKUT 00031 (IAC), if a non-biological parent ("third party") caring for a child claims to be a step-parent, the existence of such a relationship will depend upon all the circumstances including whether or not there are others (usually the biologically parents) who have such a relationship with the child also. It is unlikely that a person will be able to establish they have taken on the role of a parent when the biological parents continue to be involved in the child's life as the child's parents*."

11. The sponsor's evidence indicated an ongoing family relationship between the three minor children and their biological father. As a result, it was submitted that the judge had materially erred in law in concluding that the appellant had a "parental relationship" with the children of the sponsor.

12. It was submitted, as evidenced at [25] to [28] of the determination that the appeal had been allowed by the judge solely on the basis of the "parental relationship" between the appellant and his partner's children. The finding that the Appellant has a "parental relationship" with his partner's children was made in error and this had materially altered the outcome of the proportionality balance and ultimately the outcome of the appeal.

13. At the hearing in the Upper Tribunal, Mr Walker relied on the written grounds of appeal and submitted that the main focus was that there was a relationship between the partner's children and the biological father and the judge had not considered **Ortega** as cited above. He acknowledged that the assessment depended on the circumstances and after hearing Mr Mughal, Mr Walker conceded that the Secretary of State had taken a narrow view of the role of the appellant and his relationship with the sponsor and children and that there was evidence before Judge Symes to show the relationship as he found.

14. Mr Mughal submitted that the way the grounds had been formulated indicated that the judge had reached a finding which was not open to him. However, this was a misreading of **RK** which did not say that there can be no parental relationship where a child has a relationship with a biological father. It was unusual but it could happen. In particular, the court was referred to paragraph 42 of **RK**, which confirmed that it depended upon the circumstances and the role that the said parent played.

15. Turning to the First-tier Tribunal decision itself, I was referred to paragraph 23 where the judge gave reasons why he thought the appellant had demonstrated he had a parental relationship and had taken an active participation in the upbringing of the children, having meals with them and taking them to regular activities. In particular paragraphs 9, 10 and 16 were examples of the appellant's role. Paragraph 9 set out the circumstances in which the appellant was introduced. When the sponsor continued to have ill-health he cared for and looked after the children. The sponsor confirmed at paragraph 10 that the appellant was a wonderful father and at 16 that he attended parents' evenings for the children, in particular Sh.

16. The judge had identified that he had considered the evidence of the appellant caring for the children. This was not a challenge to the adequacy of reasons given by the judge, merely that there was a material misdirection of law and that is not made out. The findings of the judge were not inconsistent with **Ortega** or with **RK**.

Analysis

17. The one ground of challenge was that the judge had made a misdirection of law on a material matter and in particular the grounds cited paragraph 16, where the sponsor stated:

> *"16. The Sponsor gave evidence and adopted her witness statement. The younger children saw their birth father two or three times a week. Shaniya's last parents' evening was late November 2022; the Appellant had attended with her. Shanice lived in Tottenham, she had lived there for around three months, previously she was at Coventry University; they went to the baby shower in Enfield this summer. Shanice's father was a teacher in Jamaica so was not in attendance; the other stepchildren shared a different father."*

18. Reliance was placed on **Ortega** but that in turn referred to **R (on the application of RK) v Secretary of State for the Home Department (Section 117B(6): "parental relationship")** IJR [2016] UKUT 00031 (IAC). As Mr Mughal noted paragraph 42 of **RK** which confirms that

> "Whether a person is in a "parental relationship" with a child must, necessarily, depend on the individual circumstances. Those circumstances will include what role they actually play in caring for and making decisions in relation to the child. That is likely to be a most significant factor".

19. It is clear that the appellant does not have a formal, legal obligation or responsibility for the children but that is not determinative of the fact of a parental relationship. It is the role that the person plays which is significant although a caring relative or friend should not be confused with "a parental relationship". Carers are not, per se, parents. However, paragraph 44 of **RK** emphasises that if a non-biological parent, that is the third party caring for a child, claims such a relationship, its existence will depend on all the circumstances including whether or not there are others, usually the biological parents who have such a relationship with a child. In the case of **RK**, it was clear that the children and parents continued to live and function together as a family. That is not the position in this case as can be discerned from a careful reading of the decision of Judge Symes.

20. **Ortega** as cited by the Secretary of State was references **RK** and as **RK** states, "It will be difficult, if not impossible, to say in that case that a third party has 'stepped into the shoes' of the parent". However, critically at paragraph 44 of **RK** it was considered not necessary to consider more fully the position of the stepparent or partner of the primary carer when a family has split after separation or divorce of the parents because that was not the case in **RK**. It was specifically stated in **RK** at paragraph 45, "That situation may, depending upon the circumstances, present a persuasive factual matrix for there being a 'third parent'". The Upper Tribunal Judge in **RK** proceeded to hold:

> "I do not inevitably see the virtue of the argument (other than as a numerical limitation of parents to no more than two) which excludes a step-parent or partner in this latter situation from being in a 'parental relationship' if that is the substance of the relationship even where the non-residential biological parent continues to play some role."

21. It is important to note the backdrop to this application, as described by Judge Symes, which was that the appellant had known his partner since 2009 but they developed an intimate relationship from December 2020 onwards when the appellant assisted his partner because the year beforehand she had been diagnosed with breast cancer. She had continued to be very weak after chemotherapy and he would help to wash, dress and cook for her and the children and do the housework [9]. The evidence recorded was also at [10] that: "The childrens' father did not see them regularly and did not financially support them" and the appellant was "a wonderful father to them, taking them to football practice, to the park, and to McDonalds, making their breakfast, and taking them to and from school". That was evidence which was taken from the sponsor's written witness statement. The sponsor also added that her family, including her sister and her parents were in Jamaica and at [17] the judge recorded that the sponsor gave evidence that "the Appellant was now her next of kin".

22. The judge clearly accepted the genuineness of the relationship between the appellant and the sponsor rejecting the assertion by the respondent that they were not a genuine couple in the face of the "strong evidence" [21] and also accepted the relationship as claimed between the appellant and the children. That conclusion was open to him on the evidence. At [23] the judge said this:

> *"23. Given that finding, and the consistency and the plausibility of the account of the couple's family life with the Sponsor's four children, I must inevitably find that the Appellant takes a genuine parental role given his active participation in the childrens' upbringing summarised above, ranging from participating in meals to taking them for their regular activities."*

23. Although the judge did not specifically cite **RK**, I am persuaded that it was effectively applied. The overall assessment is not inconsistent with **RK** or indeed **Ortega**, when fully considered, on the basis of the evidence accepted. The appellant clearly lives with his partner and children, cared for her and the children in a range of activities during the children's mother's ill-health and recuperation. There was in fact evidence from the sponsor that the contact with the biological father was infrequent. The judge was well-aware of the requirement under EX.1 of the applicant having a genuine and subsisting parental relationship with a child because that was set out at paragraph 24.

24. There was no challenge to the adequacy of the reasoning and against the overall context of the ill-health of the sponsor and a partner, the findings of the judge that he was involved in the upbringing of the children as a parent are unsurprising, cogent and adequately reasoned.

25. On the findings as set out above, I find no arguable error of law and the decision of the First-tier Tribunal should stand.

Notice

The Secretary of State's appeal to the Upper Tribunal is dismissed. The decision of the First-tier Tribunal shall stand, and AA's appeal remains allowed.

Helen Rimington

Judge of the Upper Tribunal
Immigration and Asylum Chamber
9th May 2023