Upper Tribunal

(Immigration and Asylum Chamber) **Appeal Number: HU/09681/2019**

THE IMMIGRATION ACTS

Heard at Field House
On 28 February 2020

Decision & Reasons Promulgated
On 09 March 2020

Before

UPPER TRIBUNAL JUDGE FINCH

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

-and-

MUHAMMAD [Q]

(ANONYMITY ORDER NOT MADE)

Respondent

Representation:

For the Appellant: Mr. E. Turfan, Home Office Presenting Officer

For the Respondent: Mr A. Rizvi, legal representative, Salam & Co. Solicitors

DECISION AND REASONS

BACKGROUND TO THE APPEAL

1. The Respondent is a national of Pakistan. He initially arrived in the United Kingdom on 25 November 2009, as a student. He was subsequently granted further leave to remain as a

student until 6 March 2014. However, his leave was curtailed on 2 July 2012. He reapplied for leave to remain as a student on 30 August 2014 and on 22 October 2014 he was granted further leave to remain in this capacity until 22 January 2015.

2. The Appellant applied for asylum on 30 May 2013 but his application was refused and certified as clearly unfounded on 24 November 2014. He made further submissions and his asylum claim was reconsidered but refused on 15 June 2017 and he became appeal rights exhausted on 9 February 2018.

3. He made a human rights claim on 27 March 2019, which was refused on 10 May 2019. The Appellant appealed against this decision and First-tier Tribunal Judge Hawden-Beal allowed his appeal in a decision promulgated on 17 September 2019. The Secretary of State for the Home Department appealed against her decision and First-tier Tribunal Judge Grant granted her permission to appeal on 6 January 2020. When doing so he stated "in finding that an uncle who is named on an educational and healthcare plan has a "parental relationship" with his nephew, the judge has arguably misdirected himself as to what constitutes parental responsibility and has consequently erred in law in the application of section 117B(6) and in allowing the appeal".

ERROR OF LAW HEARING

4. The Home Office Presenting Officer and Counsel for the Respondent both made oral submissions and I have referred to them below, where relevant.

ERROR OF LAW DECISION

5. The Respondent does not assert that he is entitled to leave to remain under the Immigration Rules. Instead, he submits that he is entitled to leave to remain outside the Immigration Rules in order to ensure that no breach of Article 8 of the European Convention on Human Rights occurs.

6. Therefore, First-tier Tribunal Judge Hawden-Beal was correct to apply *R v Secretary of State for the Home Department ex parte Razgar* [2004] UKHL 27. The Appellant does not submit

that the Judge erred in law when she found in paragraphs 27 to 30 of her decision, that the Appellant had established a family and private life in the United Kingdom and refusing him leave to remain would give rise to consequences of sufficient gravity so as to breach these rights. The parties also agreed that for the purposes of Article 8(2) of the ECHR such breaches would be in accordance with the law as the Respondent was not entitled to leave to remain under paragraph 276ADE(1) or Appendix FM to the Immigration Rules and that it was also potentially justified as the Appellant was entitled to maintain effective immigration rules in order to protect the economy of the United Kingdom and ensure public order.

7. The question at issue between the parties was whether it would be proportionate to fail to grant the Appellant leave to remain in the United Kingdom in the context of the family's particular circumstances for the purposes of Article 8(2) of the European Convention on Human Rights. As a consequence, sections 117A, B and D of the Nationality, Immigration and Asylum Act 2002 had to be applied.

8. In particular, section 117B of the Nationality, Immigration and Asylum Act 2002 states:

"(1) The maintenance of effective immigration control is in the public interest".

9. However, it also states that:

"(6) 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".

10. It is not disputed that the Appellant's nephew, MSQ, is a qualifying child, for the purposes of section 117D of the Nationality, Immigration and Asylum Act 2002, as he is a British citizen. At paragraph 35 of her decision, First-tier Tribunal judge Hawden-Beal also noted that the Appellant had conceded that it would not be reasonable to expect the Respondent's nephew, MSQ, to leave the United Kingdom, where his mother and sister, who were also British citizens, resided and where he was settled in a special school and in receipt of appropriate

services from the NHS and his local authority. This was not challenged by the Appellant in her grounds of appeal.

11. In *R (on the application of RK) v Secretary of State for the Home Department (s117B(6) "parental relationship") IJR* [2016] UKUT 00031 (IAC) the Upper Tribunal found that:

"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 purposes of s.117B(6) of the Nationality, Immigration and Asylum Act 2002 depends on the individual circumstances and whether the role that individual plays establishes he or she has "stepped into the shoes" of a parent".

12. At the hearing, the Home Office Presenting Officer submitted that, in order to "step into the shoes" of a parent, a person would have to be a step-parent. However, I find that this analysis does not conform with the view formed by the Upper Tribunal in *RK* where the Tribunal stressed in its headnote that an assessment had to be undertaken of the individual circumstances of the child and the person who was not his or her biological parent and also the role that person plays in the life of that particular child.

13. By submitting that the ratio in *RK* could only apply to "step-parents" the Secretary of State for the Home Department's representative was trying to reinstate a legal precondition to the concept of a "parental relationship". In paragraph 34 of that decision, Upper Tribunal Judge Grubb correctly noted that Part 5A of the 2002 Act provides no definition of what amounts to a genuine and subsisting parental relationship.

14. At paragraph 40 of his decision, Upper Tribunal Judge Grubb also added that:

"It was common ground that the definition of a "parent" in para 6 of the Immigration Rules was not determinative of whether the applicant had a "parental relationship" with her grandchildren…para 6 has no direct application to Part 5A of the Nationality, Immigration and Asylum Act 2002".

15. This is important in my view as it is in paragraph 6 of the Immigration Rules where an analogy is drawn between a birth parent and a step or adoptive parent. No such analogy is drawn in Part 5A.

16. In addition, in paragraph 42 of his decision Upper Tribunal Judge Grubb stated:

> "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 the most significant factor…"

17. Therefore, it is clear from *RK* that the Respondent did not have to acquire a parental responsibility or special guardianship order before he could be recognised as having entered into a parental relationship with MSQ. By analogy it is also clear that MSQ's mother did not have to enter into any legal relationship, such as marriage or civil partnership, before the person caring for and making decisions about MSQ could be said to be in a parental relationship with him.

18. The Home Office Presenting Officer sought to rely on paragraph 42 of *Ayinde and Tinjom (Carers – Reg.15A – Zambrano)* [2015] 560 (IAC). The ratio of this case did not address the definition of a "parental relationship" but looked at the rights of elderly relatives of British citizens who would prefer to be cared for by a family member. The extent to which social services in England could provide additional services to MSQ was not determinative of the question of whether the Appellant had a parental relationship with MSQ.

19. First-tier Tribunal Judge Hawden-Beal had considered the Immigration Directorate Instructions relied upon in *RK*. They did not directly apply to the use of the phrase "parental relationship" in section 117B(6) but offered a useful guide to the factors that the Secretary of State believed to be relevant when considering the phrase within the Immigration Rules. Paragraph 11.2.1 of the Instructions did say that "this means that an applicant living with a child of their partner and taking a step-parent role in the child's life could have a 'genuine and subsisting parental relationship with them…". However, the guidance did not suggest that being a step-parent was a pre-condition of having such a relationship. It went on to list a

number of other factors which cumulatively could give rise to the existence of such a relationship. They included being willing and able to look after the child, living with the child, the views of the child and the extent to which the person makes an active contribution to the child's life.

20. In the current appeal, MSQ's individual circumstances included the fact that his father had no direct or indirect contact with him and had been prohibited by the Family Division of the High Court from doing so for the foreseeable future. This was clear from the judgment of Sir James Munby, then President of the Family Division, in the case of *Q v Q (No 3)*, handed down on 28 January 2016. He noted that MSQ's father had been convicted of two sexual offences involving male children and that MSQ had not seen or had contact with his father since very shortly after his father's first arrest in February 2009. There had been protracted family court proceeding in which the father sought supervised and/or indirect contact with MSQ. However, the President found that it was not in his best interests for an order for supervised or indirect contact to be made; given the risk that his father continued to pose to male children. The risk to MSQ was also found to be an enhanced one due to his special educational needs which were likely to render him more vulnerable to being groomed for sexual purposes.

21. Therefor MSQ had not had a male parental figure in his life since early in 2009. In contrast MSQ's mother's letter, dated 26 December 2018, confirmed that the Respondent had been living with her, MSQ and his older sister for the past 9 years. This was also confirmed by the Appellant's GP records which indicated that he was registered at the same address as his sister and that he first sought assistance from a doctor at the practice on 20 June 2011.

22. MSQ had also written a letter, which was in the Respondent's Bundle, which referred to the Respondent as "his father and his big brother". AA, who has cared for MSQ's sister, who has special educational needs, for a few hours each weekend since April 2014, also said in her letter, that she "would be extremely upset to see [the Respondent] leave the family he has brought a positive outcome with the children and has helped towards the children up bringing". She also described him as being a father figure to MSQ and his sister.

23. In my view it is also relevant that in paragraph 21 of his report the independent social worker also concluded that "if [the Respondent] was to be removed from the family unit, it will

potentially compromise [MSQ's mother's] ability to care for the children on her own". This was in the context of Dr. Tuna, a Neurology Consultant, confirming in her letter, dated 3 September 2018, that MSQ's mother suffers from epilepsy, had to take medication for this condition twice a day and would not be fit to drive until she had been free from any seizures for six months. A further letter from Poplar Grove Practice, dated 8 August 2019 also indicated that she suffered from low haemoglobin requiring blood transfusions due to being severely anaemic. The letter also noted that she was extremely reliant on her brother. This reliance had also been confirmed in the evidence given by the Respondent and his sister and the fact that MSQ's older sister has a number of conditions and disabilities which require close attention from his mother. In such a situation the support of another adult who offers a parental relationship is even more significant.

24. The appellant in *RK* lost her appeal as both parents were still in the family unit; albeit that the mother was suffering from multiple sclerosis. In the current case, MSQ had no contact at all with his father and his mother's medical conditions and responsibility for MSQ's sister somewhat limits her parenting abilities.

25. For all of these reasons, I find that First-tier Tribunal Judge Hawden-Beal did not err in law when he allowed the Respondent's appeal on the basis that he was in a genuine and subsisting relationship with MSQ and where the Appellant had conceded that it would not be reasonable to expect MSQ to leave the United Kingdom.

26. In her second ground of appeal, the Appellant asserted at paragraph 7 that First-tier Tribunal Judge Hawden-Beal had erred in law by placing weight on the Respondent's private life in paragraph 27 of her decision. However, in that paragraph, the Judge merely noted that for the purposes of Article 8(1) of the European Convention on Human Rights the Respondent would have formed some level of private life in the United Kingdom on account of the time that he had lived here. In paragraphs 33 and 34 of her decision she made it clear that for the purposes of Article 8(2) of the European Convention on Human Rights it was not disproportionate for the Appellant to refuse his application on private life grounds.

27. Therefore, she did not err in law in relation to her decision on his private life rights.

28. For all of these reasons, I uphold First-tier Tribunal Judge Hawden-Beal's decision.

DECISION

(1) The Secretary of State for the Home Department's appeal is dismissed

(2) First-tier Tribunal Judge Hawden-Beal's decision stands.

Nadine Finch

Signed Date 28 February 2020
Upper Tribunal Judge Finch