



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: IA276092015

THE IMMIGRATION ACTS

Heard at Birmingham Employment Centre  
On 9<sup>th</sup> May 2017

Determination Promulgated  
On 21<sup>st</sup> June 2017

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

G B  
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr I Ali (Counsel)  
For the Respondent: Mr D Mills (Senior HOPO)

DETERMINATION AND REASONS

1. This is an appeal against the determination of First-tier Tribunal Judge Frankish, promulgated on 25<sup>th</sup> August 2016, following a hearing at Bennett House, Stoke-on-Trent on 18<sup>th</sup> August 2016. In the determination, the judge allowed the appeal of the

Appellant, whereupon the Respondent Secretary of State, subsequently applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

### **The Appellant**

2. The Appellant is a male, a citizen of Afghanistan, who was born on [ ] 1997. He appeals against the decision of the Respondent Secretary of State dated 16<sup>th</sup> July 2015, on the basis of having a British citizen child, J, born of a British citizen mother, D L M, with whom he is no longer in a relationship.

### **The Appellant's Claim**

3. The Appellant's claim is (see paragraph 7 of the determination) that he has a British citizen son, J, who was born on [ ] 2014, to his British citizen mother, D L M. However, the relationship with the mother ended in April 2014, and the Appellant now has contact with the child from 1 p.m. to 3 p.m. on Tuesdays. Second, the Appellant has entered a new relationship with a C M, to whom he has been Islamically married on 22<sup>nd</sup> December 2014, having met her in May 2014, and she has two daughters, S and A, who were born in 2006 and 2007 respectively, and it would not be feasible for the Appellant's wife to live in Afghanistan, which is unstable, and the children would be disrupted, and she is also furthermore of Bengali heritage, and would not be able to speak the language there.

### **The Judge's Findings**

4. The judge heard evidence both from the Appellant and from C M. The judge concluded that, although there had been a history of domestic abuse on the part of the Appellant in relation to his first relationship with D L M, "there is not a shred of evidence of domestic abuse in the current relationship" (paragraph 28). The Appellant has been living in the household with C M, and the two stepdaughters. The judge also recounted how the Appellant arrived in the UK when he had reached the Afghan school leaving age, with no prospect of gainful employment, and he had the support of the UK policy of educating him until he was 18, following which he submitted his current application. However, "it cannot be said that the Appellant's life has ever been anything other than precarious (Section 117(5))" (paragraph 33). The judge also observed that, despite the length of time that he had been in this country, his English remained poor, and the judge concluded that, "I have not accepted the depth and quality of the relationship with the stepchildren claimed on the Appellant's behalf" (paragraph 33). However, the judge, nevertheless, in the same breath, went on to say that "he does have a (step) parental relationship with those children and they cannot be expected to go to his homeland. For different reasons from those advanced, therefore, it can be accepted that the Section 117 presumption falls away" (paragraph 33). The judge went on to conclude (at paragraph 36) that, "having found there is a form of (step) parental relationship and not having rejected the marriage as a sham, the Appellant succeeds under EX.1.2(ii) ... ..".

5. The appeal was allowed.

### **Grounds of Application**

6. The Grounds of Appeal stated that the judge erred in finding that the couple were partners since they could not meet the definition found in GEN.1.2 of Appendix FM. The judge also erred in finding that the Appellant had a genuine parental relationship with his partner's children, in that his findings were contrary to the findings that he had earlier made. Furthermore, at paragraphs 27 to 31, the judge fell into error by making conflicting findings that a genuine parental relationship had been established. The judge also fell into error in failing to consider whether the Appellant was a "partner" in accordance with GEN.1.2.
7. On 2<sup>nd</sup> December 2016, permission to appeal was granted.

### **Submissions**

8. At the hearing before me on 9<sup>th</sup> May 2017, Mr Mills, appearing on behalf of the Respondent Secretary of State, relied upon the Grounds of Appeal. First, that the judge had allowed the appeal wrongly under EX.1, finding that there were insurmountable obstacles to family life if the Appellant's current partner returned with him to his home country in Afghanistan. However, since the Appellant's current partner, C M, was his wife by way of an Islamic marriage only, with whom he commenced cohabitation subsequent to the submission of his application, the criteria set out in GEN.1.2, for the purposes of defining a "partner" were not met. The partner had to be
- (i) the applicant's spouse;
  - (ii) the applicant's civil partner;
  - (iii) the applicant's fiancée or proposed civil partner; or
  - (iv) a person who has been living together with the applicant in a relationship akin to marriage for at least two years prior to the date of the application.
9. Accordingly, the judge was bound to find that EX.1 could not be considered in this appeal. The judge allowed the appeal at paragraph 36 on this basis when he should not have done so.
10. Second, the judge also erred in consideration of Section 117B of the NIA Act 2002 because at paragraph 33 and 36 of the determination he found that the Appellant had a genuine parental relationship with the children of his partner, but these conclusions runs contrary to the previous findings made about the quality of those relationships, which he found at paragraphs 27 to 31.
11. Third, the reference to "genuine and subsisting parental relationship" as found in Section 117B(6) must mean something more than cohabitation with the child. This is clearly set out at **RK (Section 117B(6); "parental relationship") IJR [2016] UKUT**

00031, which requires a relationship of some depth and quality. That decision makes it clear that the role that this individual must play should establish that he or she has “stepped into the shoes” of a parent. This was not the case here on the very findings of the judge himself at paragraphs 27 to 31.

12. Finally, the judge was wrong to have concluded (at paragraph 33) that “the Section 117B presumption falls away, because this suggests that other parts of Section 117B which go against the Appellant are to be disregarded”. This could not be right.
13. For his part, Mr Ali submitted that, in what was a clear and comprehensive determination, this amounted to nothing more than a “simple quarrel” with the findings of the judge below. First, the Respondent at the hearing did not take the “partner” point against the Appellant at the hearing, and no arguments were presented on it. Second, the judge was considering Article 8 within and outside of the Immigration Rules. With this in mind, it is clear that the judge was right in suggesting that, although there had been violence against the former partner “there is not a shred of evidence of domestic abuse in the current relationship” (paragraph 28). Thereafter, the judge considered the evidence in a balanced and fair way (see paragraphs 29 to 30). Second, in so doing, the judge came to the firm conclusion (see paragraphs 33 and 36) that the Appellant “does have a (step) parental relationship with those children and they cannot be expected to go to his homeland”. Third, if the judge had set out his reservations as to the strength and depth of the relationship, this was a matter that he was perfectly entitled to do, and only demonstrated the care and sensitivity he showed with respect to the facts before him.

### **Error of Law**

14. I am satisfied that the making of the decision by the judge involved the making of an error on a point of law (see Section 12(1) of TCEA 2007) such that I should set aside the decision and remake the decision. My reasons are as follows.
15. First, and despite Mr Ali’s courageous efforts to persuade me otherwise, the judge’s main conclusions are not at paragraph 33 (where he states that, “although I have not accepted the depth and quality of the relationship with the stepchildren ...”), but at paragraph 28 and 31. At paragraph 28, the judge observes that the Appellant “is known to the police for domestic abuse” (such that even Miss C M “finds it necessary to keep away from the Appellant when he is in a bad mood”); that he declined to engage with therapeutic training for which he was referred; and that, “neither, in a number of other respects, does he emerge in a favourable light from the social work report”.
16. Second, there is the social worker’s report that the Appellant prioritises his own needs as opposed to those of the child, and although he claims to have a relationship with his son J, the social worker observes that, “it brings into question the true nature of his wish to care for A and S”. The judge himself concludes from this that, “those antecedents serve to give rise to the same question in respect of the Appellant’s stepdaughters”. The clear implication here is that the Appellant does not have the requisite relationship, such that he is able to step in the shoes of a natural parent, that

he is expected to have. Indeed, the judge is quite clear that, “my conclusion is that the Appellant’s role is such that it is not vital to the best interests of the girls” (paragraph 31). So much so that the judge concludes that, “I do not find the Appellant to be either as significant or as beneficial to his stepdaughters as he has claimed” (paragraph 31).

17. Third, insofar as the judge then concludes that there is a parental relationship between him and the stepdaughters, this is based on a misunderstanding of the Tribunal decision in **RK [2016] UKUT 00031**, which stated that, “it is not necessary for an individual to have ‘parental responsibility’ in law for there to exist a parental relationship, but this was subject to the caveat that the individual establishes that he or she has ‘stepped into the shoes’ of a parent”. This was plainly not the case here. Indeed, at paragraph 33, the judge records that, “although I have not accepted the depth and quality of the relationship with the stepchildren claimed on the Appellant’s behalf, he does have a (step) parental relationship with those children and they cannot be expected to go to his homeland”, which is an entirely separate matter. Just because the Appellant is living in the same household, and under the same roof as the stepchildren does not suggest that he has stepped into the shoes of a parent. In the same way, just because the children cannot be expected to go to Afghanistan with him, does not suggest that his claim is made out.
18. Fourth, to suggest that “there is a form of ‘step) parental relationship” (at paragraph 36), does not suffice to demonstrate that the Appellant has “stepped into the shoes” of a parent.
19. Finally, as far as the position of the Appellant’s current partner, C M, is concerned, the judge was also wrong to have allowed the appeal under EX.1.12(ii) because she was not his “partner” as defined in GEN.1.2, there having been only an Islamic marriage, and where the cohabitation between the two of them only began after the application.

### **Remaking the Decision**

20. I have remade the decision on the basis of the findings of the original judge, the evidence before him, and the submissions that I have heard today. I am mindful of the fact that Mr Ali submitted that, were I to make a finding of an error of law, this matter should be remitted back to the First-tier Tribunal, or at any rate provision be made for further evidence to be heard because events had moved on, not one of which was the fact that Miss C M’s former husband had now remarried in Bangladesh, but I note the provisions of practice statement 7.2 which is to the effect that, “the Upper Tribunal is likely on each occasion to proceed to remake the decision, instead of remitting the case to the First-tier Tribunal”. This is so, unless the Upper Tribunal is satisfied that the nature or extent of the judicial fact-finding is such that it is appropriate to remit the case. I am not satisfied that this is the case.
21. I have particular regard to practice statement 7.3 which makes it clear that, “remaking rather than remitting will nevertheless constitute the normal approach to determining appeals where an error of law is found, even if some further fact-finding

is necessary". Whatever may be the position in relation to Miss C M's former partner having now remarried in Bangladesh, two things remain absolutely clear.

22. First, that she was not a "partner" for the purposes of GEN1.2, so that the appeal could not have been allowed under EX1.1. or under (2)(ii). Second, that the Appellant did not have a parental relationship, in the sense that he could not demonstrate that he had "stepped into the shoes" of a parent, given the clear findings of the judge that his "role is such that it is not vital to the best interests of the girls" and that he tended to prioritise his own needs as opposed to those of his own child.
23. This being so, I am refusing this appeal for the reasons that have been set out above.

**Notice of Decision**

24. The decision of the First-tier Tribunal involved the making of an error of law such that it falls to be set aside. I set aside the decision of the original judge. I remake the decision as follows. This appeal is dismissed.
25. An anonymity direction is made.

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

Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed

Dated

Deputy Upper Tribunal Judge Juss

22<sup>nd</sup> May 2017