



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: HU/01411/2015

THE IMMIGRATION ACTS

Heard at Newport

On 2 October 2018

Decision & Reasons

Promulgated

On 15 October 2018

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

**J B C C
(ANONYMITY DIRECTION MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr J Martin instructed by Indra Sebastian Solicitors

For the Respondent: Mr C Howells, Senior Home Office Presenting Officer

DECISION AND REASONS

1. Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698) I make an anonymity order prohibiting the disclosure or publication of any matter likely to lead to members of the public identifying the appellant. A failure to comply with this direction could lead to Contempt of Court proceedings.

Background

2. The appellant is a citizen of Sri Lanka and was born on 9 July 1965.

3. The appellant arrived in the United Kingdom on 29 March 2007 as the holder of a work permit and was granted leave until 12 February 2012. The appellant's (then) wife and his son ("JC") were granted leave as his dependants. On 9 February 2012, the appellant applied for indefinite leave to remain on the basis that he had completed five years in the UK as a work permit holder. However, on 18 May 2012, that application was refused.
4. On 30 June 2012, the appellant claimed asylum but this was refused on 19 July 2012. The appellant appealed to the First-tier Tribunal. In a decision promulgated on 7 September 2012 DJ JFW Phillips allowed the appellant's appeal under Art 8 of the ECHR. The appellant was, as a result, granted limited leave to remain.
5. The appellant then made an application for further leave which was refused by the respondent on 29 June 2015 under the 'partner' and 'parent' routes in Appendix FM and under para 276ADE and outside the Rules under Art 8 of the ECHR.

The Appeal

6. The appellant appealed to the First-tier Tribunal. The appeal was heard by Judge Burnett on 16 September 2016. The sole issue before the judge was whether the appellant could succeed in establishing that he met the requirements of s.117B(6) of the Nationality, Immigration and Asylum Act 2002 (the "NIA Act 2002") on the basis that he had a "genuine and subsisting parental relationship" with JC (who is a "qualifying child" having lived in the UK for at least seven years) and that it would not be reasonable to expect JC to leave the UK. In which case, by virtue of s.117B(6), the public interest did not require the appellant's removal and his removal would, as a consequence, breach Art 8 of the ECHR.
7. Judge Burnett concluded that the appellant did not have a "genuine and subsisting parental relationship" with JC as he did not play a "significant" role in JC's life. As a consequence, he dismissed the appeal under Art 8.
8. The appellant was refused permission to appeal to the Upper Tribunal by the First-tier Tribunal on 23 February 2017 and by the Upper Tribunal itself on 23 March 2017. That latter refusal of permission was quashed by the High Court on a Cart challenge on 20 November 2017. As a result, on 12 December 2017 the Upper Tribunal (V-P Ockelton) granted the appellant permission to appeal to the Upper Tribunal.
9. Thus, the appeal came before me on 2 October 2018.

The Issues

10. It was accepted by both representatives that the sole issue in the appeal concerned the application of s.117B(6) of the NIA Act 2002.
11. That provision found in Part 5A of the NIA Act 2002 provides as follows:

- “(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 a child to leave the United Kingdom.”

12. It was accepted by both representatives that the application of s.117B(6) to the appellant’s case was determinative of the appeal. If it is applied, then his removal would be disproportionate and a breach of Art 8. By contrast, if it did not apply then the appellant’s removal was proportionate and not a breach of Art 8.
13. Mr Martin, who represented the appellant submitted that the judge had erred in law by requiring the appellant to have a “significant role” in JC’s life in order to establish that he had a “genuine and subsisting parental relationship” with JC.
14. Mr Martin accepted that, as a result of a split between the appellant and his wife, they no longer live together. JC lived with his mother in Croydon and the appellant lived in Hereford where he worked. The appellant paid his wife’s rent and had regular contact with JC. That contact was by visits, via texts and he frequently spoke to his son on the phone. Mr Martin submitted that this was sufficient to establish a “genuine and subsisting parental relationship” with JC and the judge had been wrong in law to reach a contrary conclusion.
15. Mr Howells submitted that the judge had been entitled to find at paras 56-69 that the appellant’s “role” was not sufficient to amount to a “genuine and subsisting parental relationship”. He relied upon the judge’s findings including that the appellant had not seen JC for a period of over two months include over the latter’s birthday; that the appellant lacked some knowledge of JC’s education and hobbies; that there was a paucity of photographs and that the appellant was not referred to in a document from JC entitled “My Story”. Mr Howells submitted that the judge was entitled to find that there was not a “genuine and subsisting parental relationship” between the appellant and JC.

Discussion

16. A number of matters are accepted in this appeal.
17. First, the facts were not substantially disputed before the judge and are no longer in dispute. Secondly, it is accepted that the outcome of this appeal turns upon whether s.117B(6) of the NIA Act 2002 applies. JC is a “qualifying child” as he has lived in the UK for a “continuous period of seven years or more” (see s.117D(1)). Further, it is accepted that it would “not be reasonable to expect” JC to leave the UK. The only issue in dispute is, therefore, whether the appellant has a “genuine and subsisting parental relationship” with JC.

18. In reaching his decision, the judge set out at some length an extract from the judgment in the case of R (RK v SSHD) (s.117B(6); “parental relationship”) IJR [2016] UKUT 0031 (IAC). That is a judgment of my own. In that case, there was a challenge to the Secretary of State’s conclusion that s.117B(6) did not apply to the applicant who was the grandmother of the “qualifying child”. The issue in that case was whether a “third party” who was caring for a child could be said to have a “genuine and subsisting parental relationship” with that child. In that judgment, I concluded that it would be unusual where the existing biological parent continued to act as a child’s parents that a third party could be said to have a “genuine and subsisting parental relationship” and that would only arise where the individual “steps into the shoes of the parent”.
19. Both Mr Martin and Mr Howell accepted that RK had limited relevance to this appeal. Mr Martin submitted that it concerned the issue of whether someone could establish, for the first time, the relationship rather than, as in this case, whether the appellant who had established such a relationship had, indeed, lost it. Mr Howells accepted that RK was strictly not relevant as it was concerned with a third party who was a non-biological parent and whether such an individual could be said to have established the required relationship.
20. I agree: RK is of limited assistance in determining whether the appellant has a “genuine and subsisting parental relationship” with JC. This is not a case of a ‘third party’/non-parent claiming to have a “parental relationship” who already has two other parents. The appellant is JC’s parent – it is the nature of that relationship which is in issue.
21. It is axiomatic that there is no absolute touch-stone as to what comprises a “genuine and subsisting parental relationship”. The nature of relationships between parents and their children arise in a variety of contexts; they exist in many ‘shapes and sizes’. Clearly, if the parents and child live as a family unit in a home, then there will be little doubt that there exists “genuine and subsisting parental relationships” between those parents and the child. But, such arrangements are not necessary to establish such a relationship. It is a matter of common experience that, following the breakdown of a marriage or relationship between parents, even when living separately the non-residential parent may well continue to have a “genuine and subsisting parental relationship” with their child. Continued involvement in their life, emotionally and/or financially, as a parent is also most likely to fall within the rubric of a “genuine and subsisting parental relationship”. The assessment must, necessarily, be fact-specific. Regard must be had to all the circumstances.
22. I was not referred to any legislative material dealing with the background leading to the enactment of s.117B(6) which would be relevant to its intended meaning. I was, however, referred to the relevant Home Office Guidance, albeit in the context of Appendix FM and para EX.1. The most recent is dated 22 February 2018 and is found in the “Family Migration:

Appendix FM s.1.0b – Family Life (as a Partner or Parent) and Private Life: 10-Year Routes”. That is as follows:

“Is there a genuine and subsisting parental relationship?

Where the application is being considered under paragraph EX.1.(a) in respect of the 10-year partner or parent routes, the decision maker must first decide whether the applicant has a “genuine and subsisting parental relationship” with the child.

The phrase ‘parental relationship’ goes beyond the strict definition of parent set out in paragraph 6 of the Immigration Rules, to encompass situations in which the applicant is playing a genuinely parental role in a child’s life, whether that is recognised as a matter of law or not.

The applicant must have a subsisting role in personally providing at least some element of direct parental care to the child. This will be particularly relevant where the child is the child of the applicant’s partner or where the parent is not living with the child. 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, even if they had not formally adopted the child and if the other biological parent played some part in the child’s life.

In considering whether the applicant has a “genuine and subsisting parental relationship” the following factors are likely to be relevant:

Does the applicant have a parental relationship with the child

- what is the relationship – biological, adopted, step child, legal guardian? Are they the child’s primary carer?
- is the applicant willing and able to look after the child?
- are they physically able to care for the child?

Is it a genuine and subsisting relationship?

- does the child live with the person?
- if not, where does the applicant live in relation to the child?
- how regularly do they see one another?
- are there any relevant court orders governing access to the child?
- is there any evidence provided within the application as to the views of the child, other family members or social workers or other relevant professionals?
- to what extent is the applicant making an active contribution to the child’s life?

Factors which might prompt closer scrutiny include:

- the person has little or no contact with the child or contact is irregular

- any contact is only recent in nature
- support is only financial in nature; there is no contact or emotional support
- the child is largely independent of the person

We would not generally expect that more than two people could be in a genuine and subsisting parental relationship with the child. Other people who spend time with or reside with the child in addition to their parents, such as a grandparent, aunt or uncle or other family member, or a close friend of the family, would not generally be considered to have a parental relationship with the child for the purposes of this guidance. Where there are two parents, unless evidence is provided to the contrary, it should be assumed that one or both could provide parental care for the child.”

23. I note that the guidance states that the individual must be “personally providing at least some element of direct parental care to the child”. That, however, does not seem to me to be a necessary requirement for there to be a “parental relationship”. Certainly, that is the case if the phrase “direct parental care” is intended to convey a requirement that the parent ‘look after’ the child on a face-to-face basis for some period of time. It seems to me that a “parental relationship” could exist even in the absence of such “direct care” where a parent has contact with his or her child, even on a supervised basis, but the child never stays with or is not ‘looked after’ by that parent. It seems to me that that may, nevertheless, be a “parental relationship”. Indeed, it may well be the experience of a significant number of non-residential parents (following divorce or separation of the parents) whom it would be quite wrong to say do not have a “parental relationship” with their child.
24. Nevertheless, the factors set out in the guidance are, as a matter of generality, helpful in reaching any assessment as to whether a particular relationship is a “genuine and subsisting parental relationship”.
25. In the course of the hearing, I drew the representative’s attention to a decision of the Court of Appeal in SSHD v VC (Sri Lanka) [2007] EWCA Civ 1967. In that case the Court of Appeal was concerned with the meaning of the phrase “genuine and subsisting parental relationship” in the deportation context under para 399 of the Immigration Rules as it was then worded. That, in effect, contained the wording of s.117B(6) so as to prevent the deportation of an individual who had a “genuine and subsisting parental relationship” with a British citizen child or one who had lived in the UK for at least seven years if it would “not be reasonable to expect the child to leave the UK” providing “there [was] no other family member who [was] able to care for the child in the UK”. That latter wording is, of course, not present in s.117B(6) in the non-deportation context. Indeed, para 399 has subsequently been amended by HC 532 with effect from 28 July 2014, to reflect in substance the provisions in s.117C(5) that in the deportation context the effect on a “qualifying child” must be that it would be “unduly harsh” if the individual was deported.

26. Nevertheless, in VC (Sri Lanka), the Court of Appeal recognised that the relationship between a parent and child may become so devoid of content that it is no longer a “genuine and subsisting” relationship. At [42], McFarlane LJ (as he then was) (and with whom Bean and Moylan LJ agreed) said this:

“On the basis of the Court of Appeal’s analysis of the family history, [VC] had played only a minimal role in the care of his children and, even when living at the family home, he had on a regular basis rendered himself unable to act as a parent as a result of heavy drinking and abusive behaviour. By the time of the Secretary of State’s decision to deport him, any vestiges of a ‘parental relationship’ with the children had long fallen away and had reduced to their genetic relationship coupled with the most limited level of direct contact which was intended to cease altogether on adoption. [Counsel for the Secretary of State] is correct to stress that the words ‘genuine’, ‘subsisting’ and ‘parental’ within paragraph 399(a). Each of those words denotes a separate and essential element of the quality of relationship that is required to establish a ‘very compelling justification’ [per Elias LJ in *AJ (Zimbabwe)*] that might mark the parent/child relationship in the instant case as being out of the ordinary.”

27. It is important to notice that the “most limited level of direct contact” referred to by McFarlane LJ, was as a result of the court order six hours contact each year.
28. On its facts, therefore, VC (Sri Lanka) was a case which fell at one extreme on a spectrum of involvement in a child’s life. It was a case where, in effect, the individual’s involvement with the child was not far short of *de minimis*. It is no support for the proposition that a parent must have a “significant” role in order for there to be a “genuine and subsisting parental relationship”.
29. One further point about VC (Sri Lanka). At [43], McFarlane LJ went on to state that, in order for para 399(a) to apply:

“[t]he ‘single’ parent must have a ‘subsisting’ role in personally providing at least some element of direct parental care to the child.”

30. The basis for that view was derived from the wording of para 399(a) – to which I have already referred above – that “there is no other family member who is able to care for the child in the UK”. That led McFarlane LJ to conclude that para 399(a) was concerned with “depriving a child of a parent whose role included some direct care”. He went on in [43] to observe:

“To hold otherwise, and to accept [Counsel for VC’s] submission that her client comes within the exception simply because he has some limited, non-caring contact with his child would enable very many foreign criminals to be included in this exception.”

31. The wording relied upon by McFarlane LJ is not reproduced in s.117B(6) and the context is not that of deportation. If Parliament had wished to constrain the application of s.117B(6) in this way, it could have done so but it did not. There is nothing inherent in the wording of s.117B(6) that would imply that a “parental relationship” could only exist if “direct care”

was provided by the individual. I do not consider that such a requirement is a necessary element of a “genuine and subsisting parental relationship” in s.117B(6) as I have explained above.

32. It is not entirely clear from the papers, and Judge Burnett does not provide any elucidation, when the appellant first went to work away from London. In his determination in 2012, DJ JFW Phillips accepted that they had all lived together in Croydon for the first two years of his stay in the UK. That would mean until sometime in 2009. Certainly by the time of Judge Phillips’ decision, the evidence was that, although the marriage was subsisting, the appellant lived away and spent time periodically and regularly with his family in Croydon. The evidence was that he went back to Croydon every three months staying for one week at a time.
33. By the time of the hearing before Judge Burnett, the evidence was as follows:
 - “56. I have considered carefully the role that the appellant plays in the care of his son and what decisions he makes.
 57. I note that there are a few photographs of the appellant with his son (JC) (Two in the bundle). I would state that in the life of a 14 year old boy it amounts to very little and for a young man who has been in the United Kingdom since 2007.
 58. I note and have taken account of the letter from the appellant’s son. He did not attend the appeal hearing of his father (the appellant). JC states however that his father regularly contacts him and visits him once a month and during the half term holidays. He also states that the appellant buys him clothes and anything he needs. There is a longer “letter” from JC entitled “My Story”. There is no reference in that document to the appellant at all.
 59. I note that there is also a very brief letter from the appellant’s wife, BC. The letter stated that the appellant pays her rent and has contact with JC regularly. I note that there is evidence of money transfers.
 60. The Appellant states in his statement that he contacts his son regularly via text and he speaks to his son frequently on the phone.
 61. In answer to questions at the hearing the appellant stated he last saw his son on 5th July. The appeal hearing was on 16th September. That is a period of over 2 months since the appellant last saw his son. The appellant stated he did not see his son on his birthday as he had to work and look after the shop.
 62. In answer to questions from me the appellant stated his son was at school and hence couldn’t attend the appeal hearing. He stated he was 14 years old and in year 9 at school. He stated that his son will take his GCSE exams after Christmas. He could not tell me which subjects his son was going to take exams in. He stated that his son’s hobbies were cricket, swimming and badminton. I have contrasted this with the document “My Story”. In that document JC describes his passion for singing and the “countless occasions” he has performed. There is mention in the document of badminton but not of swimming.

63. I have taken into account the appellant's lack of credibility when he gave evidence in 2012 regarding his asylum claim. I have taken into account the observations of FtJ CM Phillips [allowing the appeals on the appellant's wife and JC under Art 8 in 2016] about the immigration history which I have set out above.
64. *I do not consider that the appellant plays a significant role in the life of his son.* There is little evidence presented to me to show that between 2012 and September 2016, the appellant played a parental role in his son's life.
65. It also does not appear the appellant gives any real care as such to JC. I find he visits him infrequently although I note the statements to the contrary. The appellant's son was born on 5th August 2002. He was 14 years old on 5th August 2016. The appellant stated at the appeal that he last visited his son in July. A birthday is a significant event and yet it appears that the appellant has made little effort to be with his son near or on that day.
66. I note also that JC mentioned a matter which he described as a significant event in his life when he was chosen as one of the 10 to serve at "The Good Shepherd Mass" at St. George's Cathedral. There was no mention of this by the appellant and no photographs of the event. The photographs that have been produced show just two photographs of the appellant with his son.
67. I also consider that the appellant's son is entering an important point in his life as he prepares for his GCSE's. The appellant seems to know little about his son's choices and education.
68. I have taken into account that there is evidence to support the suggestion that the appellant provides financially for his son." (my emphasis)

34. At para 69 Judge Burnett reached the following conclusion adverse to the appellant:

"69. I find that the appellant has not discharged the burden of proof upon him to show that he has a genuine and subsisting **parental** relationship with his son. The role the appellant plays in his son's life is *not a significant one* and it does not appear he makes any decisions in respect of his son's life. He may visit him infrequently and provide financially but in my judgment this is not sufficient to support a finding that he has a genuine and subsisting parental relationship." (my emphasis)

35. I accept Mr Martin's submission that the judge misdirected himself in assessing whether there was a "genuine and subsisting parental relationship" between the appellant and JC. There is nothing implicit in the notion of a "genuine and subsisting parental relationship" that the individual (the parent) must play a "significant role" in the child's life. The assessment is holistic and fact-sensitive. Judge Burnett, in my judgment, misdirected himself by requiring that the appellant play a "significant role" in JC's life.

36. Here, the evidence from the appellant, JC and his mother was that the appellant did have a "genuine and subsisting" role in JC's life. The appellant's evidence was that he saw JC during school holidays for about

one week at a time and on six to seven other occasions throughout the year, for example birthdays and special occasions. The appellant's evidence was also that he had a "good relationship" with JC and that:

"We text each other every day, he will text morning and evening to say morning and good night. We are in frequent touch electronically. We also speak on the phone frequently as well, more often on Sunday. I see him as and when I can."

37. In his evidence, JC said that the appellant has "regular contact [] with me". He said that the appellant came to see him once a month and during half-term holidays. The appellant spent about four days with him on average and then left to go back to his place where he worked. During those stays, JC said:

"I spend time with him where I enjoy myself and really have fun and excite going to different places of interest and helps in my History subject. I also feel happy when he is around".

38. JC went on to say that the appellant buys him clothes whenever there is a need and he also buys him any other school requirements.
39. The appellant's wife confirmed that the appellant paid her rent where she and JC lived. She confirmed that the appellant had "regular contacts" with JC by phone and met him once a month and during half term holidays.
40. The evidence was, therefore, that the appellant was providing a 'roof over the head' of son, JC and providing financial support – each of which are some indication of a 'parental relationship' even if they would not alone suffice.
41. In my judgment there is only one reasonable view that could be taken of this evidence, none of which was rejected by the judge, and that is that the appellant has a "genuine and subsisting parental relationship" with JC. He is a non-residential parent, but he keeps contact with JC (through visits and otherwise) because he is his father and he provides both emotional and financial support for JC. He carries out that role because he is JC's father.
42. That the appellant missed seeing JC on his last birthday, when he had an explanation that he had to work and look after the shop in Hereford, and that he does not have knowledge about all of JC's education and hobbies and was not mentioned in JC's "My Story", does not detract from the evidence (which is not challenged) in relation to the appellant's continued active involvement as a parent in the life of JC albeit tempered by the fact that they live, in effect, on opposite sides of the country.

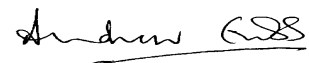
Decision

43. In my judgment, Judge Burnett erred in law in concluding that the appellant had not established a "genuine and subsisting parental relationship" with JC. On that basis, his decision to dismiss the appellant's

appeal involved the making of an error of law. It cannot stand and I set it aside.

44. I remake the decision and find, on a balance of probabilities, that on the evidence the appellant has established a “genuine and subsisting parental relationship” with JC.
45. It was accepted before me by both representatives that if that was the fact then s.117B(6) of the NIA Act 2002 applied and the appellant’s removal was not in the public interest and his appeal should be allowed under Art 8.
46. I, therefore, substitute a decision allowing the appellant’s appeal under Art 8.

Signed



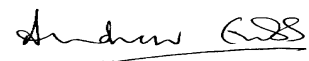
A Grubb
Judge of the Upper Tribunal

10 October 2018

TO THE RESPONDENT
FEE AWARD

As I have allowed the appeal, it is appropriate to make a full fee award for any fee paid or payable.

Signed



A Grubb
Judge of the Upper Tribunal

10 October 2018