Upper Tribunal
(Immigration and Asylum Chamber)

Case No: UI-2023-000460
First-tier Tribunal No: HU/54365/2022

THE IMMIGRATION ACTS

Heard at Bradford
On the 5th February 2024

Decision and Reasons
Promulgated
7th February 2024

Before

DEPUTY UPPER TRIBUNAL JUDGE KELLY

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

ZOHAIB NASEER
(ANONYMITY NOT DIRECTED)

Respondent

DECISION AND REASONS

Representation:

For the Appellant: The appellant in person
For the Respondent: Mr Diwnycz, Senior Home Office Presenting Officer

Introduction

1. This is an appeal by the Secretary of State (with permission) against the decision of First-tier Tribunal Judge Cox to allow Mr Zohaib Nasser's appeal against refusal of his application for leave to remain in the United Kingdom as the step-father of AA.

2. For ease of exposition, I shall refer to the parties in accordance with their appeal status before the First-tier Tribunal.

The agreed facts

3. The following findings of the First-tier Tribunal are not challenged in this appeal.

4. The appellant is a male citizen of Pakistan who was born on the 15th April 1985. AA is a 9-year-old boy and a British citizen. The appellant is not AA's biological father. However, AA's mother (MK) falsely registered him as such shortly after AA was born. The appellant thereafter brought up AA as his own child until he and MK separated in 2018. AA has since stayed with the appellant for two consecutive nights each weekend, as well as on further occasions during school holidays. MK consults the appellant in respect of all the important decisions concerning AA's education and welfare. AA has never known his biological father and believes him to be the appellant.

The decision of the First-tier Tribunal

5. The judge began by considering whether the appellant met the definition of a 'parent' under the Immigration Rules. He noted that this included, "the stepfather of a child whose biological father is not dead". Whilst there was no evidence to suggest that AA's biological father was dead, Judge Cox noted that the list of those who were capable of meeting the definition was inexhaustive, and concluded that it was broad enough to encompass a person, "who has some parental responsibility for a child" [33]. He considered the fact that MK had named the appellant as the AA's father in the Register of Births, Deaths and Marriages as indicative of her intention that he should have some parental responsibility for AA [36]. The judge thus concluded that the appellant met the definition of a 'parent' and, given the circumstances described in the previous paragraph (above), he also concluded that the appellant met certain other 'eligibility requirements' of Section E-LTRP of Appendix FM of the Immigration Rules; that is to say, he was satisfied that the appellant was taking and intend to continue to take an active role in AA's upbringing [40].

6. The appellant could not, however, meet the immigration eligibility requirement under Section E-LTRP. This was because he was a so-called 'over-stayer'. The judge therefore considered whether the appellant met the alternative requirements of Section Ex of Appendix FM of the Immigration Rules. In doing so, he noted that AA was a British child who was under the age of 18 years, and that the only other requirement under Section Ex was that, "it would not be reasonable to expect the child to leave the UK". The judge considered this to be "a relatively straightforward issue" given that AA was over 7 years old, had only ever lived in the UK, and was settled and doing well at a local school. It would thus be clearly unreasonable to expect AA to leave the UK [44, 45].

7. The judge nevertheless considered that this was, "not necessarily determinative of the appeal", and that he was thus required to have regard to all the factors listed in section 117B of the Nationality, Immigration and Asylum Act 2002 [46]. He accordingly noted that the appellant spoke English, was financially self-supporting, and that he met the Immigration Rules as above. He was thus satisfied, "on balance", that the appellant's

removal from the United Kingdom would be a disproportionate with the right of the appellant and AA to family life as against the legitimate objective of "maintaining a coherent system of immigration control".

The grounds of appeal

8. There are three grounds of appeal. These can be conveniently summarised as follows:

(i) It was "potentially bordering on the perverse" for the judge to base a finding of parenthood on a perjured entry in the Register of Births, Deaths and Marriages.

(ii) The above error "infects" the ultimate conclusion that the Secretary of State's decision is disproportionate given that (a) the appellant is not the child's biological parent, (b) was never married to the child's mother, and (c) the child lives with his mother who has "full parental responsibility for him" and would not therefore be forced to leave the UK if the appellant were to be returned to Pakistan.

(iii) In considering the public interest in maintaining immigration controls, the judge failed to have regard to the fact that the appellant was living in the UK illegally when he entered into a relationship with the child's mother, and that he had been working illegally in the UK since his leave to remain was curtailed in 2020. The judge's conclusion that, "none of the negative factors of 117 apply", is thus clearly a misdirection of law that causes his decision to be "materially flawed".

9. Mr Dywnicz indicated that he relied upon the grounds as set out above. I did not thereafter call upon the appellant because I had by that stage decided to dismiss this appeal.

Discussion

10. There are undoubted errors in the judge's legal analysis. However, none of them (singly or cumulatively) are such as to infect his conclusion upon what was, in truth, the only real question to be resolved in this appeal, namely, 'is it reasonable to expect AA to leave the UK?'.

11. Whilst the judge was correct to observe that the list of those who qualify as a 'parent' under paragraph 6 of the Immigration Rules is inexhaustive, he was in error in supposing that the list could properly be expanded by reference to the motives and intentions of AA's mother in falsely registering the appellant as his biological father. Such considerations were simply irrelevant to the question of whether the appellant qualified as AA's "parent" and was thereby potentially eligible for a grant of leave to remain under the 5-year route to settlement. Moreover, given that the appellant did not meet the essential pre-condition for settlement under that route (parenthood) there was no possibility of him qualifying under the alternative 10-year route to settlement prescribed by

Section Ex of Appendix FM the Immigration Rules. The position would have been different had the appellant met all the eligibility requirements save for that relating to his immigration status. In such a case, the Immigration Rules expressly mandate consideration of this route as the alternative to the 5-year route to settlement (see paragraph E-LTRT.3.2(b)). As it was, the judge ought to have proceeded directly to consider the position under Article 8 of the Human Rights Convention, as directed by Section 3.2 of Appendix FM of the Immigration Rules.

12. A further error in the judge's analysis was that having found that the appellant met the requirements of the Immigration Rules under Section Ex of Appendix FM, he nevertheless held that "this is not necessarily determinative of the appeal". However, had the judge been correct in finding that the appellant met those requirements, this would indeed have been determinative of the appeal (see TZ (Pakistan) and PG (India) v Secretary of State for the Home Department [2018] EWCA Civ 1109). Nevertheless, given that the appellant did not in fact meet the requirements of the Immigration Rules (for the reasons considered above), together with the fact that the judge in the event proceeded to consider the appeal under section 117 of the 2002 Act (albeit that he took the wrong route to get there) this error was also immaterial to the outcome of the appeal.

13. Finally, the judge erred in supposing that he was required to undertake the balancing exercise by reference to the first five factors listed under section 117B of the Nationality, Immigration and Asylum Act 2002 (the public interest in maintaining immigration controls, the ability to speak English, financial self-sufficiency, and the limited weight attaching to relationships established whilst present in the United Kingdom unlawfully and/or precariously). The judge was equally in error in failing to have regard to the only sub-section of section 117 that *was* relevant to the facts of the appeal, namely, sub-section (6). This reads as follows:

> 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.

14. However, even this error was not material to the outcome of the appeal. This is because the judge *did* consider the self-same test, albeit under the relevant provision of Section Ex of Appendix FM of the Immigration Rules, couched as it is in identical terms to those of sub-section (6) of the Act. By this sub-section, Parliament determines where the balance lies as between the public interest in maintaining immigration controls and the best interests of a qualifying child. Any further assessment under Article 8 of the Human Rights Convention is accordingly otiose.

15. There was no dispute that AA is a 'qualifying child' given that he is under 18 years and a British citizen. Moreover, the concept of a 'parental relationship' is significantly wider than that of a 'parent' under paragraph 6 of the Immigration Rules (above). Indeed, the Respondent's own guidance recognises as much –

> The phrase goes beyond the strict legal definition of parent, reflected in the definition of 'parent' 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. 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, but only if the other biological parent played no part in the child's life, or there was extremely limited contact between the child and the other biological parent
>
> [See para 11.2.1 of the relevant IDI, as quoted at paragraph 35 of R (on the application of RK) v Secretary of State for the Home Department(s.117B(6); "parental relationship") IJR [2016] UKUT 00031 (IAC).]

Given the above, taken together with the facts as found, it was not only reasonably open for the judge to conclude that the appellant had a genuine and subsisting parental relationship with AA, it would have been perverse for him to have held otherwise.

16. As previously noted, the only real issue in this appeal was whether it was reasonable to expect AA to follow the appellant should he be removed to Pakistan. The respondent's grounds of appeal argue that the judge erred in considering the matter hypothetically, rather than by reference to any actual necessity for AA to follow the appellant to Pakistan given that he could remain in the UK with his mother. It is surprising (to say the least) that the respondent continues to make this argument given that it has been held erroneous on at least three occasions: twice by the Upper Tribunal, and once by the Court of Appeal (see Secretary of State for the Home Department v AB (Jamaica) [2019] EWCA (Civ) 661). The judge was thus entirely right to consider the prospect of AA leaving the United Kingdom upon a purely hypothetical basis. Moreover, his conclusion that this would be unreasonable was inevitable given the circumstances of the appeal as outlined in paragraph 4 (above).

17. I therefore hold that only the first of the respondent's three grounds of appeal has been made out. However, the error identified therein was wholly immaterial to the outcome of the appeal.

Notice of Decision

The appeal is dismissed, and the decision of the First-tier Tribunal therefore stands.

Signed: David Kelly Date: 5th February 2023

Deputy Judge of the Upper Tribunal