Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/04567/2015**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 27 March 2018	**On 16 April 2018**

Before

UPPER TRIBUNAL JUDGE KOPIECZEK
UPPER TRIBUNAL JUDGE LINDSLEY

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MW
(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Mr T. Melvin, Senior Home Office Presenting Officer
For the Respondent: Ms Akusu-Ossai, Counsel

DECISION AND REASONS

1. Although the appellant in these proceedings is the Secretary of State, we continue to refer to the parties as they were before the First-tier Tribunal.

2. The appellant is a citizen of Jamaica, born in 1969. He first arrived in the UK in September 2000 with a visitors' visa but he was refused entry. He was granted temporary admission so that he could report for a flight to Jamaica the next day, but he failed to report. He remained in the UK without leave until 5 September 2005 when he was detained and removed to Jamaica.

3. He next arrived in the UK on 15 March 2008 with entry clearance as a spouse, having married a British Citizen (Ms W) in Jamaica on 26 November 2005. He was subsequently granted leave to remain as a spouse until 26 August 2012. An application for indefinite leave to remain ("ILR") as a spouse was refused on 12 March 2013 and he thus became an overstayer.

4. On 18 May 2015 he made an application for leave to remain on human rights grounds on the basis of his family and private life. That application was refused in a decision made on 6 August 2015. The appellant appealed against that decision and his appeal came before First-tier Tribunal Judge R.G. Walters ("the FtJ") at a hearing on 19 September 2017 whereby the appeal was allowed. Permission to appeal against the FtJ's decision having been granted, the appeal came before us.

5. In order to put the parties' respective arguments and our decision into context, we summarise the FtJ's decision.

The FtJ's decision

6. The FtJ summarised the parties' cases and to which he made further reference in his findings. Although under the subheading "My Findings of Fact", that section of the FtJ's decision consists mostly of a narrative of the evidence of the appellant and his wife, without explicit findings along the way. Nevertheless, at [22] he said that he found the appellant and his wife (Ms W) to be "honest witnesses who had given credible evidence".

7. That evidence, set out under the 'Findings' subheading, was as follows. The appellant explained that there was a gap between the expiry of his leave in August 2012 and the application of January 2013 which was a result of the appellant having been under the impression that he needed to pass the English language and citizenship test in order to be granted further leave as a spouse. He had only passed the test on the third attempt.

8. The appellant said that at the date of hearing before the FtJ he was staying at his mother's property and that he and his wife had been living apart since April 2017. They were living apart because he has "anger management issues" which he said were caused by his difficulties with literacy. However, he said that he hoped to be reunited with his wife.

9. His daughter, G, is the child of a woman (who he named) with whom he had had a relationship. However, G's mother had refused to provide him with a copy of G's passport or her birth certificate. The appellant gave G's date of birth and said that he and G's mother were separated before G was born because G's mother found out that he was married to his present wife (Ms W). The appellant's evidence was that he sees G regularly and in the most recent school holidays had seen her for weeks at a time.

10. In relation to the appellant's own mother, he said that she is a British Citizen and he attends all her medical appointments, and helps her with household chores. She has limited mobility after a knee operation.

11. Ms W's evidence was that she is a British Citizen and the address that she lived at was one in respect of which she and the appellant are joint tenants. She had recently retired after 29 years' service as a finance officer with a local authority in South London. She and the appellant were living apart but she said that they were "currently working to address these problems as we very much love each other". The appellant, she said, suffered from anger management issues. She said that they hoped to resolve their difficulties, but added that the pressure of his immigration case had not helped their situation.

12. Her evidence was that she would be devastated if the appellant were not allowed to stay in the UK because she could not live in Jamaica, explaining that she was born in the UK, had spent all her life here, has two adult children in the UK who are very much part of her life, and also having her extended family here consisting of her siblings and parents.

13. In relation to G, her evidence was that G visits her house on a regular basis and G had spent most of the recent summer holidays with the appellant. G is very much part of her life, she said. During term time she stays at her house roughly every other weekend.

14. She explained in cross-examination that she was trying to get back together with the appellant, and that they still see each other despite their living in separate accommodation. She supports the appellant financially, as does the appellant's mother.

15. In his specific findings at [22]-[24], in addition to stating that he found the appellant and Ms W to be honest and credible, he accepted that they hoped "to give their marriage another go", stating that he found it particularly impressive that Ms W attended court in support of the appellant.

16. Noting that there was no DNA or documentary evidence to show that G was the appellant's daughter, the FtJ accepted that she was. He found that Ms W was such a credible witness that he was able to accept her evidence on this, and found that she had built up a relationship with G over the years and that G had become part of her life.

17. Also noting that there was no documentary evidence that G is a British Citizen (the appellant's evidence being that G's mother would not cooperate in providing documentary evidence), he found it probable that she is a British Citizen, based on the evidence of the appellant and his wife. He referred to two "very well-written letters" from G in support of the appellant remaining in the UK, the letters referring to the things that they do together, her visits to the appellant's house and his sister's house.

18. At [26] the FtJ concluded that the appellant's removal would amount to an interference with the exercise of his and his wife's right to respect for private and family life, and that Article 8 was engaged. He found that the interference was not in accordance with the law because the appellant "could meet the requirements of the Immigration Rules under Private and Family life as stated in the following paragraphs".

19. He then went on to find that the appellant and Ms W have a genuine and subsisting relationship in that they remain lawfully married and, although at that time living apart, intend to resume cohabitation and intend to live together permanently in the UK.

20. In relation to G, at [29] he concluded that the appellant had not established that he could meet the requirements of the Immigration Rules in terms of the need to establish either sole responsibility for G, or that she normally lives with him and not with her mother with whom she spends the majority of her time.

21. The FtJ then considered the proportionality of the respondent's decision in relation to G, referring to s.117 of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act"), in particular s.117B(6).

22. At [33] he said as follows:

> "I find that it is probable that [G] is a British Citizen, based on the evidence of the Appellant and his wife. Even if she is not, she is now aged 11 and I was satisfied that she had been born in the UK and lived here throughout her life. I further found that it would not be reasonable to expect her to leave the United Kingdom, because if she did so, she would have to be separated from her mother."

23. He concluded therefore that "the interference" would not be proportionate to the legitimate public end sought to be achieved.

The grounds and submissions

24. The respondent's grounds contend that the FtJ had erred in concluding that the appellant met the 'partner route' under the Immigration Rules given the evidence from the appellant and his wife, and that they had not cohabited since April 2017. It was insufficient for the FtJ to have found that the relationship was subsisting simply because of the willingness of the appellant's wife to attend the hearing and give evidence.

25. Furthermore, it is argued that the FtJ had not considered that the appellant would need to meet the requirements of paragraph EX.2 and the need to establish insurmountable obstacles to family life between the appellant and his wife continuing in Jamaica. Ex.2 had not been addressed at all.

26. In relation to G, in essence the grounds argue that the FtJ was not entitled to find that she was a British Citizen or to accept the appellant's evidence (which was based on what he had first said four years ago) that G's mother was not prepared to provide any supporting evidence as to her citizenship or his paternity in circumstances where the appellant had not provided evidence of the legal advice that he claims that he had sought, or received. Further, the FtJ had erred in assessing G's best interests when it was still not known whether or not she is British or related to the appellant.

27. In submissions, Mr Melvin relied on the grounds. It was submitted that the appellant had not provided any evidence that he had undertaken an anger

management course and no evidence that he had addressed the issue of domestic violence that had occurred in his relationship with Ms W.

28. Neither the appellant nor Ms W gave evidence that G is a British Citizen. We were informed that she has discretionary leave to remain along with her mother (although it was accepted that this information was not put before the FtJ). It was conceded that G was born in the UK, but there was nothing to show that the appellant was her father.

29. In her submissions, Ms Akusu-Ossai referred to various aspects of the evidence that was before the FtJ and his findings. He was aware of the fact that there was no documentary evidence of G's British Citizenship but he accepted the evidence given by the appellant and Ms W.

30. It was submitted that the FtJ was not required to consider paragraph EX.2. There was evidence in the bundle of Ms W's health problems although admittedly the FtJ did not refer to that evidence. Even if he had been required to consider EX.2, had he done so the outcome would have been the same.

31. Furthermore, the FtJ concluded that if G had to leave with the appellant, she would be separated from her mother.

32. In reply, Mr Melvin argued that we were being asked to read into the decision findings that had not been made. It was submitted that the finding that the appellant and Ms W were in a subsisting relationship was an irrational finding. In relation to G's status in the UK, we were referred to *Oladeji (s.3(1) BNA 1981)* [2015] UKUT 00326 (IAC) to the effect that G would need to make an application to register as a British Citizen if she is not already one, and to show that she had not left the country, and there was no evidence of those matters.

Assessment and Conclusions

33. At the conclusion of the hearing we announced that we were satisfied that the FtJ had erred in law, but that the error(s) of law did not require his decision to be set aside.

34. We do not accept that there was any irrationality in the FtJ's finding that the appellant and his wife are in a subsisting relationship and intend to live permanently together in the UK. He was well aware of the fact that the appellant and his wife were not living together and he accepted their evidence as to why. He made clear reference to the 'anger management issues' that the appellant and his wife referred to. He did not need to decide that the appellant had successfully completed a relevant course in relation to anger management although there was some, albeit limited, evidence in the bundle that he had attended counselling sessions in 2015. Having seen and heard them given evidence, he was entitled to find that they both gave credible evidence in relation to their intention to resolve the difficulties in their relationship, and that their separation was, in effect, temporary.

35. The question of the subsistence of a relationship and the intention of the parties is plainly a very fact-specific one. We do not find that the mere fact of their having lived separately in the five months preceding the hearing before the FtJ meant that the FtJ was prohibited from concluding that theirs was nevertheless a subsisting relationship, and taking into account that they had been married for 11 years at the date of the hearing before the FtJ. There is no reason in law or in fact as to why a relationship that is subsisting may not nevertheless be one where the parties have separated out of choice to allow them the opportunity to resolve issues within the relationship, apart from each other.

36. However, we do accept that the FtJ erred in not considering the application of paragraph EX.2 which, to summarise, requires the appellant to establish that there would be insurmountable obstacles to their family life continuing outside the UK; in this case Jamaica. The FtJ did not refer to EX.2 at all and indeed there is no assessment at all of the extent to which they would be able to live together as a couple in Jamaica; neither within nor outside the Rules. In fact, we would go further and say that it is not even clear whether the FtJ concluded that the appellant's Article 8 rights would be infringed by his removal with reference to his relationship with his wife.

37. We do not accept the argument advanced on behalf of the appellant to the effect that there was evidence from which the FtJ could have concluded that there would be insurmountable obstacles to their family life continuing in Jamaica, with reference to the evidence in the appellant's bundle of Ms W's health conditions. Not only did the FtJ not refer to this evidence, this is not a case in which it is obvious that if he had considered it he would have concluded that she could not live in Jamaica with the appellant.

38. In relation to G, we are not persuaded that there is any merit in the contention that the evidence before the FtJ did not establish the appellant's relationship with his daughter (either as a biological parent or in terms of the emotional relationship between them).

39. As to the finding that the appellant is G's father, the FtJ was again alive to the fact that there was no documentary or DNA evidence establishing that he is G's father but he found the evidence of the appellant and his wife persuasive in this respect. Although no birth certificate was produced, according to the appellant's evidence in his witness statement his name is not on the birth certificate anyway, stating that he was in Jamaica when she was born (she was born in 2006 and he returned to the UK in 2008) and he and G's mother were separated before she was born.

40. As to G's citizenship, it is not correct as was suggested on behalf of the respondent before us that neither the appellant nor his wife said that she was a British Citizen; they both did assert that in their witness statements.

41. The FtJ did not have to be certain of G's citizenship. He said at [24] that he found it "probable" that she was a British Citizen, after referring again to

the lack of documentary evidence on the issue but noting also the evidence of the lack of cooperation from G's mother.

42. The FtJ concluded at [29] that the 'sole responsibility' rule (E-LTRPT.2.3(a)) was a bar to the appellant succeeding under the Rules as a parent. He was undoubtedly correct to conclude that the appellant was not able to meet that distinct aspect of the Rules because even if the appellant was able to establish that he met the requirements of EX.1 (genuine and subsisting relationship with a qualifying child/not reasonable to expect the child to leave the UK), the sole responsibility rule or its alternative requirements under E-LTRP.2.3 would need to be satisfied. EX.1 is an additional requirement to that aspect of the Rules.

43. However, the FtJ ought to have gone on to consider the alternative requirement under E-LTRP.2.3(b), in particular whether the G's mother was a British Citizen or settled in the UK. After all, he concluded that G was a British Citizen and G's mother's status was relevant to that issue. As noted above, Mr Melvin informed us that G's mother had discretionary leave to remain, but no evidence of that was before the FtJ, or indeed before us. Nevertheless, the error on the part of the FtJ in failing to consider all elements of that aspect of the Rules is not material because it could not have affected the outcome of the appeal. Further, it is not a matter that was relied on on behalf of the respondent.

44. S.117B(6) of the 2002 Act states as follows:

> "**117B Article 8: public interest considerations applicable in all cases**:
>
> …
>
> (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."

45. The FtJ assessed the extent to which the appellant and his daughter's circumstances came within those provisions of the 2002 Act. Even if, contrary to our conclusions, the FtJ was not entitled to find that G was a British Citizen, she is undoubtedly a 'qualifying child' as defined in s.117D(1) of the 2002 Act by reason of being under the age of 18 and having lived in the UK for a continuous period of seven years or more. The FtJ found, and was entitled to find, that she has lived in the UK throughout her life. Contrary to what was submitted on behalf of the respondent before us, there was simply no basis upon which the FtJ could have concluded that G had spent any time outside the UK such as to mean that her residence was not 'continuous'. The respondent's decision does not advance such a proposition either.

46. The conclusion that it would not be reasonable to expect G to leave the UK, for the sole reason that the FtJ gave, namely that she would be

separated from her mother, was an inevitable one in this case on the evidence.

47. We do consider that the basis upon which the FtJ allowed the appeal could have been made more explicit, at least in terms of whether he allowed the appeal on the basis of the appellant's relationship with Ms W. However, it is at least clear that he allowed the appeal on Article 8 grounds in terms of the appellant's relationship with his daughter, and there is no error of law in his having done so.

48. The FtJ did not consider, in the alternative, the question of whether G would be entitled to British Citizenship on the basis of her length of residence in the UK as a minor. S.1(4) of the British Nationality Act 1981, to summarise, is to the effect that G would be entitled to apply for registration as a British Citizen after attaining the age of 10 years subject to no absence from the UK for more than 90 days in any one year. Given that the FtJ found that G is a British Citizen he did not need to consider those provisions.

49. However, we consider that even if the FtJ was not entitled to find that G is a British Citizen, her entitlement to apply to register as a British Citizen would undoubtedly have been a significant feature of any proportionality assessment in the appellant's favour.

50. Whist therefore, we are satisfied that the FtJ erred in law in the respects to which we have referred, the error(s) of law are not such as to require the decision to be set aside because they are not material to the outcome of the appeal.

Decision

51. The decision of the First-tier Tribunal involved the making of an error on a point of law. However, its decision is not set aside and its decision to allow the appeal under Article 8 of the ECHR is to stand.

Upper Tribunal Judge Kopieczek 11/04/18

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

Because this decision involves a minor, 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 his 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.