Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/04912/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 19 February 2018	**On 15 March 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE NORTON-TAYLOR

Between

B M
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

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 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.

Representation:
For the Appellant: Mr J René, Counsel, instructed on a Direct Access basis
For the Respondent: Mr Kotas, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is a challenge by the Appellant to the decision of First-tier Tribunal Judge Troup (the judge), promulgated on 4 May 2017, in which he dismissed the Appellant's appeal. That appeal had been against the Respondent's decision of 1 February 2016, refusing his human rights claim. The application giving rise to that refusal was based upon the Appellant's relationship with MP, a British citizen, and her daughter, N, also British and aged 14 years at the relevant time.

The judge's decision

2. The judge first dealt with what he described as the ETS issue. The Respondent had asserted that the Appellant had previously practised deception in obtaining an English language certificate. Having considered all of the evidence before him, the judge found that the Respondent had failed to make out her case and that there had been no deception [14 – 19]. In respect of the Article 8 claim, the judge's findings are set out at [39 – 43]. The judge first concludes that Article 8 was not engaged but then goes on to consider the claim on the basis that it was. There is reference to section 117B(4) of the Nationality, Immigration and Asylum Act 2002, as amended.

3. The judge goes on to consider the best interests of N, having regard to medical evidence contained in the bundle before him. He observes that there was no evidence about the provision of certain medical services in Bangladesh and no evidence from relevant social services in this country as to how N's best interests would be affected whether she remained in this country or went to Bangladesh.

4. Finally, having weighed up certain matters set out in [43], the judge concludes that Article 8 would not be breached by the Appellant's removal.

The grounds of appeal and grant of permission

5. The grounds focus, perhaps unsurprisingly, on section 117B(6) of the 2002 Act and on the issue of N's best interests. It is asserted that the judge failed to deal with the first point at all and the second inadequately.

6. Permission was granted by First-tier Tribunal Judge Robertson on 15 November 2017.

The hearing before me

7. Although it is the Appellant's appeal, I first turned to Mr Kotas and asked him for his view on the section 117B(6) issue. He submitted that the evidence before the judge indicated that the Appellant did not have a parental relationship, but could be better described as an uncle figure or at least somebody who provided some support to N. He noted that it was unclear as to how precisely the Appellant's case had been put to the judge.

8. Mr René pointed me to the evidence from MP and N (contained in their respective witness statements), the medical evidence at 125 – 126 of AB1, the fact that the judge accepted there to be family life between the Appellant and MP and N, and finally to a

paragraph at page 3 of the reasons for refusal letter. It was, Mr René submitted, obvious that section 117B(6) was potentially engaged and that the judge should have engaged with it. His failure to do so was a material error.

9. Mr René further submitted that even if section 117B(6) was not engaged because there was no parental relationship, there was still the issue of N's best interests to be considered and the judge had not dealt with this adequately.

Decision on error of law

10. As I announced to the parties at the hearing, I conclude that the judge materially erred in law. He did so in two ways.

11. First, he failed to deal with section 117B(6). I accept Mr Kotas' point that it is somewhat unclear whether this particular provision was raised at the hearing or in advance by the Appellant's representative. The Record of Proceedings was not clear on the point and there was no skeleton argument before the judge.

12. Notwithstanding this lack of clarity, this particular mandatory factor under the 2002 Act was, in my view, an obvious issue that fell to be considered. The combined effect of the witness statements of the Appellant, MP and N all went to show that the former is regarded as the stepfather of N, at least on a subjective level. That evidence was before the judge of course. In addition, the medical evidence referred to by the judge in [42] of his decision refers to the Appellant as being the stepfather of N. The reasons for refusal letter itself expressly accepted that the Appellant had a genuine and subsisting relationship with both MP and N. Finally, what is said in [41 and 42] of the decision indicates that the judge was considering N's circumstances in the context of her relationship with the Appellant.

13. All of these matters pointed in one direction only, namely that the issue of whether there existed a genuine and subsisting parental relationship between the Appellant and N was one which required consideration and a clear finding one way or the other.

14. The second material error is in the alternative to the first. Even if it was never suggested that the Appellant had a parental relationship with N, there was still the issue of N's best interests, she clearly being a child affected by the Respondent's decision. Indeed, the judge did begin to consider N's best interests at [42]. However, although he notes that there was an absence of evidence on particular issues, there was evidence (in the form of witness statements from N and MP and medical evidence) which provided a platform upon which clear findings on the best interests could and should have been made. However, there are no clear findings in [42 or 43] as to what precisely the best interests were, how strong they were in relation to the Appellant's presence in N's life as a support mechanism, and what effect a departure would be on those best interests.

15. As a result of my conclusions I decided that I should set aside the judge's decision.

Re-making the decision

16. Both representatives were agreed that I should re-make the decision based on the evidence before me and in light of further submissions to be made. I gave Mr Kotas time to read relevant parts of the Appellant's large appeal bundle (which was before the First-tier Tribunal) and he confirmed that he was content to proceed having done so. There was no need for further oral evidence. Both representatives were agreed that the ETS issue was no longer live.

17. Mr René submitted that the Appellant did have a genuine and subsisting parental relationship with N. He placed particular reliance upon the passage in the reasons for refusal letter, and the witness statements of the Appellant, MP, N and N's maternal grandmother. He referred me to 125 – 127 of AB1. He submitted that the Appellant had been an influential supporting figure in N's life, particularly since he began living with her and her mother in August 2015. I was referred to 1 and 4 of AB2. Mr René submitted that the evidence from the police was particularly significant. I was referred to the decision of the Upper Tribunal in RK [2016] UKUT 00031 (IAC). The first limb of section 117B(6) was met. In respect of the second limb, Mr René submitted that in all the circumstances it would not be reasonable to expect N to leave the United Kingdom.

18. In respect of the alternative argument that the Appellant could go to Bangladesh and make an entry clearance application, Mr René relied on the totality of the family unit's situation. Even a temporary separation would arguably be disproportionate given the state of health of both N and MP.

19. Mr Kotas accepted that in light of N's particular circumstances it would not be reasonable to expect her to leave the United Kingdom. However, he submitted that in this case the Appellant did not have a genuine and subsisting parental relationship with N. He relied on the fact that the relationship had not been in existence for a particularly long period of time. He also referred me to 819 of AB1 and it was noted that he was not named as part of N's household or as another significant person in her life. The same applied to page 191 of AB1. It may be that the Appellant was close friends with N, but he had not stepped into the shoes of a parent.

20. In reply Mr René referred me to pages 133 and 138 – 139 AB1. The Appellant had in fact been present at a case conference with relevant agencies relating to N's wellbeing. This was another indicator that he was regarded by relevant professionals as being the stepfather of N.

21. At the end of submissions I reserved my decision. I indicated to the parties that if I found that section 117B(6) did not apply I would invite further written submissions from both parties as to the possibility of the Appellant being required to return to Bangladesh and make an entry clearance application from there.

Findings of Fact on the Re-make decision

22. There are very few, if any, factual disputes left in this appeal. For the sake of completeness and for the avoidance of any doubt, I find that the Appellant did not practise any deception in respect of the English language certificate. This matter is no longer in dispute.

23. I find that the Appellant has been living with MP and N since August 2015. In respect of N, it is abundantly clear that she has had an extremely troubled life and continues to suffer from significant mental health problems, without there being a need to go into detail as to what these are and/or the causes thereof.

24. Mr Kotas was correct to accept that it could in no way be reasonable for this young woman to be expected to leave the United Kingdom. Again, for the avoidance of any doubt, I set out the relevant factors which no doubt informed Mr Kotas' concession and would form the basis of my finding in any event:

    (i) N is British;

    (ii) she has resided in this country all her life and is now 15 years old;

    (iii) she has had and still has significant mental health problems which have included attempts on her life and self-harm;

    (iv) she is a subject of specific social services intervention;

    (v) she has received specialist education;

    (vi) she has been assessed as at least a medium risk to herself, particularly if she goes out and engages with certain people away from the family home;

    (vii) very recently she has been the victim of an alleged very serious sexual assault, in respect of which police investigations are ongoing.

25. In light of the above it would be perverse to conclude that N could reasonably be expected to leave this country.

26. I turn to what I consider to be the core issue in this appeal, namely whether the Appellant has a genuine and subsisting parental relationship with N. Having considered the evidence as a whole, I find that he does and this is so for the following reasons.

27. First, the Respondent expressly accepted at page 3 of the reasons for refusal letter that the Appellant had a "genuine and subsisting relationship with" MP and N. This is clearly a relevant factor for my consideration.

28. Second, the clear and, in my view, compelling evidence from not only the Appellant and MP but, importantly, N herself, as contained in the witness statements, shows that the three members of the family unit regard themselves as being just that: a

family unit, with the Appellant acting as stepfather to N. In respect of N's own evidence I take into account her overall circumstances and the importance which she must clearly attach to having a supportive and stabilising figure in her life.

29. Third, the Appellant's relationship with MP and N has not been particularly lengthy. However, I view the temporal aspect of the case in view of the circumstances as a whole. The evidence indicates that the Appellant has had a significant positive impact on the lives of both MP and N even in the short time that he has known them. In the context of N, she has taken him into her circle of confidence, as it were, and that, in my view, counts for a lot, notwithstanding the relatively short duration of their relationship.

30. Fourth, the letter from the Children's Society at 1 AB2 clearly regards the Appellant, MP and N as a single family unit. The police letter at 4 AB2, which I regard as being of particular significance, refers to the Appellant as N's stepfather and makes it clear that he has attended appointments with the police in support of N. I note as well that the medical evidence at 126 AB1 also refers to the Appellant as being N's stepfather. The combined effect of this evidence from relevant professionals, all clearly independent sources, is that there is a wider and considered view that the Appellant is in fact acting as N's stepfather.

31. Fifth, Mr Kotas raised the concern that the Appellant was not named as part of N's household or as another significant adult in her life in the document starting at 819 AB1. At first glance, his point is a fair one. It does appear odd that the Appellant is not named in this document. However, Mr René then directed me to the report of a child protection conference which took place on 28 February 2017, in particular at 134 and 138 AB1. Here, not only is the Appellant named as having attended the conference, but he is referred to as N's stepfather and is included in the body of the report as being a person to be involved in decision-making on her behalf, along with MP. In my view this is a strong indicator of the views of the relevant agencies as to the Appellant's true position in N's life. It also provides sufficient evidence to show that the omission of the Appellant's name from the document at 819 AB1 is either an error or oversight.

32. Sixth, I have taken into account the decision in RK. Cases such as this are fact-specific.

33. Taking all of the matters set out above into account, it is in my view clear that the Appellant has stepped into the shoes of a parent in respect of his relationship with N.

Conclusions

34. In light of my findings above the Appellant can satisfy the first limb of section 117B(6). He does have a genuine and subsisting parental relationship with N. Mr Kotas has quite properly conceded that it would not be reasonable to expect N to leave the United Kingdom. Therefore, the second limb under this mandatory factor is met. In light of the Court of Appeal judgments in MA (Pakistan) [2016] EWCA Civ 705 and AM (Pakistan) [2017] EWCA Civ 180 the satisfaction of Section 117B(6) is

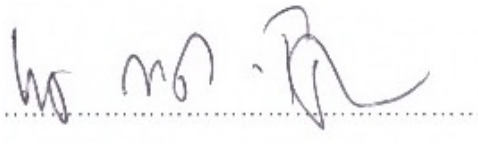
sufficient for the Appellant to succeed in his appeal. Nothing more need be shown in respect of the Article 8 claim (Mr Kotas has certainly not sought to argue to the contrary).

Notice of Decision

The decision of the First-tier Tribunal contained material errors of law and I set it aside.

I re-make the decision in this appeal and conclude that the Respondent's refusal of the Appellant's human rights claim is unlawful under section 6 of the Human Rights Act 1998.

The Appellant's appeal is therefore allowed.

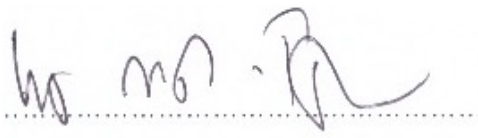


Signed Date: 13 March 2018

Deputy Upper Tribunal Judge Norton-Taylor

TO THE RESPONDENT
FEE AWARD

As I have allowed the appeal and because a fee has been paid or is payable, I have considered making a fee award and have decided to make a fee award of £140.00.



Signed Date: 13 March 2018

Deputy Upper Tribunal Judge Norton-Taylor