Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/07354/2018**

THE IMMIGRATION ACTS

Heard at Field House	**Decision and Reasons Promulgated**
On 18 January 2019	**On 04 February 2019**

Before

UPPER TRIBUNAL JUDGE HEMINGWAY

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

M S D
(ANONYMITY NOT DIRECTED)

Respondent

Representation:

For the Appellant:	Mr T Lindsay	(Home Office Presenting Officer)
For the Respondent:	Ms A Petyna	(Counsel)

DECISION AND REASONS

1. This is the Secretary of State's appeal to the Upper Tribunal, brought with the permission of a Judge of the First-tier Tribunal, from a decision of the First-tier Tribunal (hereinafter "the tribunal") which it made on 4 June 2018 following a hearing of 31 May 2018 and which it sent to the parties on 25 June 2018. The tribunal decided to allow the claimant's appeal from the Secretary of State's decision of 8 March 2018 refusing to grant him leave to remain under Article 8 of the European Convention on Human Rights (ECHR).

2. I have not directed anonymity in this case. The tribunal did not do so, I was not invited to consider doing so and I could not think of a persuasive reason to do so.

3. The background circumstances are set out in the tribunal's written reasons for June 2018 and in the various documents before me which the parties have. So, I do not propose to rehearse all of that in detail in this decision. But shorn of all but the essentials, the background circumstances may be summarised as follows: The claimant is a male national of Albania and he was born on 15 June 1984. Since 2011 he has been in a relationship with a female British citizen, one [VB]. They had met in Albania and the relationship was continued by way of visits which Ms [B] and her two infant children (born on 7 September 2003 and 23 September 2006 respectively and whom are both British citizens) had made to Albania. The claimant applied, for his part, for a Visit Visa in order to come to the United Kingdom ('UK') to see Ms [B] on three occasions but, each time, the application was refused. Then, in March 2016, the claimant entered the UK illegally and commenced cohabitation with Ms [B]. He has remained here, continuing to cohabit with Ms [B] and her two children, ever since. The father of the two children from whom Ms [B] is separated, continues to have a parental relationship with those children. But the claimant asserted that he too had a parental relationship with the children and he relied upon that and his relationship with Ms [B] for his contention that it would be unlawful, having regard to Article 8, to refuse leave and/or to require him to return to Albania.

4. Since as noted above, the Secretary of State refused his application, the claimant appealed to the tribunal. At the hearing before the tribunal both parties were represented. The claimant and Ms [B] both gave evidence. The representatives then, in the usual way, made oral submissions. It is important to note, at this stage, that the representative for the Secretary of State made a concession, which the tribunal recorded at paragraph 19 of its written reasons, to the effect that, having regard to the content of section 117(6)(a) of the Nationality, Immigration and Asylum Act 2002, if the requirement therein was met then it would not be reasonable to expect the children to leave the UK. The practical upshot of that was that the claimant would succeed if he could successfully establish before the tribunal that he had a parental relationship with the two children or, indeed, I suppose, even with only one of them.

5. The tribunal, as is apparent from its written reasons, considered matters with considerable care. With respect to what it made of the claimant's relationship with the children, it said this:

> "11. It is worth noting from the outset that the Respondent has not disputed the chronology as outlined at paragraphs 1-2 above. Furthermore, the Respondent has not disputed that a relationship exists between the Appellant and Ms [B] and her children.
>
> 12. It is accepted by all parties that the Appellant cannot meet the Immigration Rules for leave to remain as a partner. This is because he fails to meet the definition of partner in GEN.1.2 as he had not been residing with Ms [B] for two years prior to the date of the application.
>
> 13. With respect to private life, the Appellant cannot meet paragraph 276ADE(1)(iii)-(v). Considering 276ADE(1)(vi), there is no evidence before me that there are very significant obstacles to the Appellant's integration into Albania were he

required to leave the United Kingdom. The Appellant is from Albania and has family in Albania and I find that he would be able to reintegrate back into Albanian life if required to leave the United Kingdom.

14. I turn now to the consideration of Article 8 outside of the Rules. First, with respect to the public interest factors at section 117B, I note the following:

    a) That the Appellant can speak little English, although I accept that he is learning from communicating with Ms [B]'s children;

    b) With respect of the Appellant's financial circumstances, he has indicated he is being supported by his brother and friends. I have no evidence of how much the Appellant is receiving and how regularly. Furthermore I have no evidence as to the source of the Appellant's brother's and friends income. I am not satisfied that he is financially independent;

    c) The Appellant's private life whilst in the United Kingdom has developed while his stay has been unlawful;

    d) The Appellant's relationship with Ms [B] began 5 years before his arrival in the United Kingdom, however since his arrival in the United Kingdom in 2016 it has further developed while his stay has been unlawful.

15. Section 117B(6) provides:

    '(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.'

    With respect to 117B(6)(a), I am invited to find that the Appellant has a genuine and subsisting parental relationship with Ms [B]'s children.

16. The case of R (on the application of RK) v SSHD (s.117B(6); 'parental relationship' IJR [2016] UKUT 00031 held that apart from the situation of split families where relationships between parents have broken down and an actual or de facto step-parent exists, it will be unusual but not impossible for more than 2 individuals to have a parental relationship with a child. Thus, the view of the Upper Tribunal, albeit obiter, was that where there was a split family and a de facto step-parent, it would be less unusual for more than 2 individuals to have a parental relationship towards a child.

17. It seems to me that the issue as to whether a genuine and subsisting parental relationship exists is fact sensitive, and depends on whether the Appellant has assumed the role of a parent. Although the biological father plays a role in the children's lives, I find that the Appellant has assumed some parental responsibilities with respect of the children, for the following reasons:

    a) The Appellant lives with the children and provides day to day care, including cooking meals;

    b) Ms [B] is plainly the main decision maker with respect of the children, but includes the Appellant, as well as the biological father in decisions with respect of the children;

c) The letter from [EB] indicates that the Appellant takes an active role in many if not all aspects of her life, including her schoolwork, her football club and her meals;

d) The letter from [DB] indicates that the Appellant takes an active role in his life, including his homework, caring for him whilst he was ill, and giving him advice when he was going through problems.

In my view, when one looks at the substance and range of the support and care the Appellant provides to the children, it amounts to a genuine and subsisting parental relationship.

18. I am obliged to consider the best interests of the children under section 55 of the Borders, Citizenship and Immigration Act 2009, which requires me to view the children's interests as a primary, albeit not paramount consideration. It is plainly in the children's best interests to remain in the United Kingdom with their mother and father, and to continue to receive the support currently provided by the Appellant.

19. Mr Larcombe sensibly conceded that were section 117(6)(a) met, then it would not be reasonable to expect the children to leave the United Kingdom. The children are British citizens and their mother is Kosovan. Although they have been on holiday to Albania they plainly have no meaningful experience of life in Albania. Both the children are at an advanced level of education. Darius is due to take his GCSE's this year and will have developed social contacts outside of the family. Even taking into account the public interest factors which point towards removal, in my view they ae not sufficiently powerful to displace the children's best interests in remaining in the United Kingdom; MA (Pakistan) [2016] EWCA Civ 705."

6. For good measure, the tribunal then went on to address what the situation would have been irrespective of section 117(6). It said this:

"20. Even if section 117(6) did not apply in this case, I am satisfied that removal of the Appellant would be disproportionate in the circumstances. First, while the Appellant did not meet the Rules at the date of the application, I find that the Appellant does satisfy the Rules at the date of the appeal hearing. It is not disputed that he has been residing with Ms [B] in a relationship akin to marriage for at least two years. I find that there are insurmountable obstacles preventing their family life continuing outside of the United Kingdom. Ms [B] is the main care giver to her two children, who live with her and it is unreasonable to expect them to leave the UK. That being the case, I find that the children's dependency on Ms [B] would amount to insurmountable obstacles preventing Ms [B] from continuing her family life with the Appellant outside the United Kingdom.

21. Secondly, even if the Appellant did not have a 'genuine and subsisting relationship' under section 117B(6), it is accepted by the Respondent that the Appellant has a relationship with the children. This relationship extends to providing day to day care and support in a number of crucial areas in the children's lives as outlined in paragraph 17.

22. I remind myself that exceptional circumstances do not mean searching for a unique or unusual feature, and that the test is one of proportionality; Agyarko [2017] UKSC 0011. Taking into account the strong relationship the Appellant has

> with the children, and the fact that he is likely to meet the requirements of the partner rules in Appendix FM at the current time, and balancing this against the countervailing factors outlined in para 14 above, I am satisfied on the balance of probabilities that his removal from the United Kingdom would be a disproportionate interference with his family life and would breach Article 8. I therefore allow the appeal."

7. So, as noted, the appeal succeeded. But that was not the end of the matter because the Secretary of State applied for and obtained permission to appeal. In the grant of permission this was said:

> "2. The ground seeking permission are somewhat lengthy but, in short, it is argued that the judge failed to provide adequate reasons and therefore, the judge erred in allowing the appeal.
>
> 3. It appears from the judge's decision that the appellant is not the biological father of the children in this case. Indeed, the biological father still plays an active role in the lives of the children. As such, it may be open to argument that the judge erred in finding that the appellant has a parental relationship with the children.
>
> 4. There is an arguable error of law."

8. Permission having been granted the matter was listed for a hearing before the Upper Tribunal (before me) so that it could be considered and decided whether the tribunal had erred in law and, if it had, what should flow from that. Representation at that hearing was as indicated above and I am grateful to each representative. In the event it was only necessary for me to hear from Mr Lindsay.

9. He made a number of points. He explained that it had been indicated before the tribunal that the claimant had delayed making the application to the Home Office and which has ultimately led to this appeal before the Upper Tribunal, for tactical reasons. He said that when that is considered alongside the claimant's decision to enter the UK illegally it militates against the tribunal's finding that his evidence was credible. As to the case of *RK*, to which the tribunal referred in the passages from which I have quoted, Mr Lindsay suggested that it might have misunderstood or misapplied what had been said. The evidence to support the claim that there was a parental relationship had been weak. If the tribunal's approach was the correct one that would probably mean all persons who have a partner with whom they cohabit and who have children could demonstrate the existence of such a relationship. That could not feasibly be the true position. The tribunal's decision was unsafe.

10. The tribunal, in my judgment, carried out a careful and comprehensive assessment as to the key issue of whether or not the claimant could be said to have a "parental relationship" with Ms [B]'s two children. Given the concession referred to above, if the tribunal's decision as to that was legally sound then the decision itself would be so.

11. The tribunal noted the factual background in its written reasons and noted the oral evidence which was given to it. It summarised the submissions made to it. It correctly acknowledged that it would be rare for more than two individuals to have a parental

relationship with a child. But it also correctly directed itself to the fact that the question of whether there was or was not such a relationship between a particular individual and a child or children would be "fact-sensitive". It then made its findings of fact all of which were open to it and found itself persuaded in the claimant's favour on the basis of those findings. That approach, in general terms, cannot be faulted.

12. To deal with Mr Lindsay's particular points, it may very well be the case that there is good reason to criticise the claimant for his decision to enter the UK illegally and effectively circumvent the Immigration Rules rather than to make an application for entry clearance abroad. Whilst there was disagreement between the parties as to whether the claimant had acknowledged tactical delay in the making of an immigration application, during the course of the hearing before the tribunal, the tribunal was aware that his immigration history was culpable anyway and, since it referred to it, did take it into account. I can find nothing in what the tribunal said to suggest it misunderstood or misapplied what was stated in *RK*. As to the strength or otherwise of the evidence pointing to the existence of a parental relationship, it was for the tribunal to assess that and to decide how persuasive that evidence was. Perhaps on one view the conclusion that there was such a relationship might have been generous but that does not mean such a conclusion was reached in reliance upon a legally erroneous approach. The tribunal made it clear that it was deciding matters on the particular circumstances in front of it and I do not find the argument that such an approach would result in many cases being found in favour of claimants to be particularly persuasive.

13. In short, the tribunal considered the evidence, made its findings of fact, and correctly applied the law to those findings. That is what was required of it and that is what it did. Once it had resolved the parental issue in the claimant's favour, as indicated, that was really the end of the matter.

14. In the circumstances this appeal to the Upper Tribunal fails.

Decision

The decision of the First-tier Tribunal did not involve the making of an error of law and shall stand.

No grant of anonymity is made.

Signed: Date: 28 January 2019

Upper Tribunal Judge Hemingway