Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/07333/2019

THE IMMIGRATION ACTS

Heard at Birmingham	**Decision & Reasons Promulgated**
On 3rd March 2020	**On 23rd March 2020**

Before

DEPUTY UPPER TRIBUNAL JUDGE ROBERTS

Between

KIRANDEEP [K]
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Miss Chaggar of Counsel
For the Respondent: Mrs Aboni, Senior Presenting Officer

DECISION AND REASONS

1. The Appellant a citizen of India (born 24th October 1989) appeals with permission against the decision of the First-tier Tribunal (Judge Parkes) dismissing her appeal against the Respondent's decision of 27th March 2019 refusing her leave to remain in the United Kingdom on Article 8 family/private life grounds.

2. On 26th July 2018 the Appellant made a human rights claim for leave to remain in the United Kingdom on the basis of her relationship with her partner and his three children, the eldest of whom is 12 years of age and

the youngest 5 years. Her partner is an Indian national who has settled status in the UK; the children are all British citizens.

3. The Respondent refused the application because the Appellant did not meet the eligibility requirements of the Immigration Rules; she had remained unlawfully in the UK since 2014 without leave. The Respondent considered that paragraph EX1 of the Rules did not apply because the Appellant had not provided evidence to show any exceptional level of dependency of the children upon her. Furthermore EX1(b) of the Rules did not apply because it was not accepted that there were insurmountable obstacles to family life with her partner continuing outside the UK.

4. In addition the Respondent was not satisfied that the Appellant met the requirements of paragraph 276ADE of the Rules. She had only resided in the UK for eight years and ten months prior to the date of the application for leave to remain. The Respondent considered whether there were any exceptional circumstances in the Appellant's case, but decided that the evidence submitted was insufficient to show that the Respondent's decision would result in unjustifiably harsh consequences for the Appellant, her partner or her partner's children. This decision was arrived at by taking into account the best interests of the children as a primary consideration. The Respondent refused the application.

5. The Appellant appealed the Respondent's refusal to the First-tier Tribunal. In a decision promulgated on 4th September 2019 the FtT dismissed the appeal.

Onward Appeal

6. The Appellant sought and was granted permission to appeal to the Upper Tribunal. The grounds seeking permission set out three strands, as follows:

   (i) the FtT's consideration of "insurmountable obstacles" under the Rules is flawed;

   (ii) there was a failure to adopt the correct approach in having regard to the best interests of the children, and in the Article 8 assessment as a whole; and

   (iii) there was a failure to give anxious scrutiny to the case which when read as a whole displays missing passages [13] and confused findings contained in the "Decision and Reasons" [18 - 19].

7. Permission was granted by FtTJ Gumsley in the following terms:

   "3. … I am satisfied that it is arguable that Judge Parkes did materially err in law:

(i) in the approach taken, and weight attached, to the Appellant's immigration status when considering the proper application of the Immigration Rules;

(ii) in that the judge has not given anxious scrutiny to the case, having regard to apparently missing passages [13], and confused findings [18][19] in the Decision and Reasons; and

(iii) has failed to have regard to relevant evidence and adopted a flawed approach when considering the question of the best interests of a child in the assessment of Article 8 as a whole.

4. In the circumstances, permission to appeal is granted. The Appellant may argue all the grounds pleaded by counsel."

8. Thus the matter comes before me to determine whether the decision of the FtT contains such material error that it must be set aside and the decision remade. A Rule 24 response was served by the Respondent defending the decision.

Error of Law Hearing

9. Before me the Appellant was represented by Miss Chaggar of Counsel and the Respondent by Mrs Aboni, Senior Home Office Presenting Officer. I heard submissions from both representatives. Miss Chaggar's submissions relied in the main on the grounds seeking permission. In addition she emphasised the following points:

- the FtTJ had placed too much emphasis on the fact that the Appellant was an overstayer. This was only one factor in any consideration of whether there are insurmountable obstacles to a return to India
- the Appellant's family life is continuing between her and her partner and her partner's three British children. For that family life to continue in India was virtually impossible. To expect the Appellant's partner to wind up his business and relocate to India was unrealistic
- there was a flawed approach to the question of the best interests of the three British children. The Appellant provides their day-to-day care for a great part of the time and she is effectively their main carer because she steps into her partner's shoes when he is at work.

10. Miss Chaggar then drew my attention to [18] of the decision which she said made no sense at all. This, she said, indicated the lack of care with which the judge had approached the evidence. Her final point was a reiteration of the fact that maintenance and accommodation was not an issue in the Appellant's case. Her partner had ample funds to maintain and accommodate her.

11. Mrs Aboni on behalf of the Respondent relied on a Rule 24 response which had been served. She submitted that the judge had directed himself

appropriately. The judge was correct in that the starting point in this appeal was the Appellant's immigration status. She had remained in the United Kingdom unlawfully. Unlawful status was properly relevant when considering the Immigration Rules. Added to this the Appellant does not have a parental relationship with her partner's three children such as to bring her within the Rules. The judge had made a finding that he did not accept the Appellant's evidence regarding the impression she was trying to give that the children's mother was not interested in them. The judge factored those matters into his decision as he was entitled to do. The result is that the Appellant's presence in the UK is not essential to the extent that the children are dependent upon her because both father and mother are present in the UK.

12. So far as [18] is concerned, Mrs Aboni accepted that there was a lack of proofreading. That was an error but not a material one because it is clear from a reading of the decision as a whole why the appeal fails. It was open to the judge to find that there were no insurmountable obstacles to the Appellant and her partner returning to India. The decision was sustainable and contained no material error.

13. At the end of submissions I reserved my decision which I now give with reasons.

Consideration

14. It appears to me that the central issue in this appeal turns on the judge's approach to the application of EX1 and by extension Section 117B(6) [12]. The judge found that Section 117B(6) does not apply as the Appellant does not have a parental relationship with her partner's children [17]. The Appellant argues that the judge failed to give proper consideration to the evidence showing the extent of the care that she provides for the three children. He therefore misdirected himself in his finding at [12] that the Appellant does not have a parental relationship with them. I am bound to say that I find merit in this claim.

15. Both the Appellant and her partner gave evidence to the FtT. The evidence of the Appellant outlined the extent of the care she provided to her partner's children. It was a detailed account. Whilst I accept that the judge has made a finding, namely that he disbelieved the Appellant's evidence that the children's biological mother was not interested in them, nevertheless he has failed to analyse and make findings on the extent and nature of the care provided by the Appellant.

16. I accept that the FtTJ has noted that he was handed up a copy of **R (on the application of RK) v SSHD (s.117B(6); "parental relationship") IJR [2016} UKUT 31 (IAC)**. It is difficult to see however that the useful guidance given therein has been fully applied to this case.

17. **RK** was a case concerning a grandmother who relied on the relationship with her grandchildren in order to remain in the UK in circumstances

where the children were living with her but also with both parents. I find that what is said in [42 – 43] of **RK** is particularly relevant to this appeal.

> "[42]Whether a person is in a 'parental relationship' with a child must, necessarily, depend on the individual circumstances. Those circumstances will include what role they actually play in caring for and making decisions in relation to the child. That is likely to be a most significant factor. However, it will also include whether that relationship arises because of their legal obligations as a parent or in lieu of a parent under a court order or other legal obligation. I accept that it is not necessary for an individual to have 'parental responsibility' in law for there to exist a 'parental relationship', although whether or not that is the case is a relevant factor. What is important is that the individual can establish that they have taken on the role that a 'parent' usually plays.
>
> [43] I agree with Mr Mandalia's formulation that, in effect, an individual must 'step into the shoes of a parent' in order to establish a 'parental relationship'. If the role they play, whether as a relative or friend of the family, is as a caring relative or friend but not so as to take on the role of a parent then it cannot be said that they have a 'parental relationship' with the child. It is perhaps obvious to state that 'carers' are not *per se* 'parents'. A child may have carers who do not step into the shoes of their parents but look after the child for specific periods of time (for example whilst the parents are at work) or even longer term (for example where the parents are travelling abroad for a holiday or family visit). Those carers may be professionally employed; they may be relatives; or they may be friends. In all those cases, it may properly be said that there is an element of dependency between the child and his or her carers. However, that alone would not, in my judgment, give rise to a 'parental relationship'".

18. In short this extract confirms the highly fact-sensitive nature of the inquiry that needs to be made to determine whether a "parental relationship" exists. The judge's findings are insufficient to show that the he has had regard to all the evidence before him.

19. This is sufficient to show a material error requiring the decision to be re-made. In view of this finding it is not necessary to address the other grounds put before me. The decision will have to be set aside in its entirety and a fresh fact-finding analysis undertaken. It is right that this decision is returned to the First-tier Tribunal for that Tribunal to remake the decision.

Notice of Decision

The appeal against the decision of the First-tier Tribunal promulgated on 4th September 2019 is allowed for material error. The decision is set aside. The appeal is remitted for rehearing before the First-tier Tribunal (not Judge Parkes) with no findings preserved for that Tribunal to re-make the decision.

No anonymity direction is made.

Signed **C E Roberts** Date 19 March 2020

Deputy Upper Tribunal Judge Roberts