Upper Tribunal
(Immigration and Asylum Chamber)

Appeal number: HU/20284/2019 (V)

THE IMMIGRATION ACTS

Heard Remotely at Manchester CJC
On 9 December 2020

Decision & Reasons Promulgated
On 17 December 2020

Before

UPPER TRIBUNAL JUDGE PICKUP

Between

ELVIR [M]

(ANONYMITY ORDER NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

DECISION AND REASONS (V)

For the appellant: Ms E Mottershaw, instructed by Berwicks Solicitors
For the Respondent: Mr D Clarke, Senior Presenting Officer

This has been a remote hearing which has been consented to by the parties. The form of remote hearing was video by Skype (V). A face-to-face hearing was not held because it was not practicable, and all issues could be determined in a remote hearing. At the conclusion of the hearing, I reserved my decisions and reasons, which I now give. The order made is described at the end of these reasons.

1. The appellant, who is a national of Bosnia & Herzegovina with date of birth given as 15.2.88, has appealed with permission to the Upper Tribunal against the decision of the First-tier Tribunal promulgated 18.2.20 (Judge Cox), dismissing his human rights appeal against the decision of the Secretary of State, dated 26.11.19, to refuse his

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application made on 16.7.19 for Leave to Remain in the UK on article 8 ECHR private and family life grounds.

2. Permission was granted by the First-tier Tribunal on 1.5.20, considering it arguable that the First-tier Tribunal erred by applying a too-narrow test for family life and did not consider the prospect of contact with his child being granted by the Family Court rather than the appellant's intentions in seeking contact.

3. On 12.6.20 the Upper Tribunal issued directions proposing that the error of law determination be made on the papers without a hearing but offered the opportunity to objection to be taken and invited further submissions in writing on the error of law issue. Following submissions in response to the directions, on 24.9.20 Upper Tribunal Judge Smith directed the error of law issue to be determined a remote oral hearing. Thus, the matter came before me on 9.12.20.

4. Judge Smith raised the possibility that if an error of law were to be found, the Tribunal may need to consider whether this is a case for the invocation of the Protocol between the Tribunal and the Family Court in order to obtain documentation as to family proceedings.

5. I have carefully considered the decision of the First-tier Tribunal in the light of the submissions and the grounds of application for permission to appeal to the Upper Tribunal.

Relevant Background

6. The relevant background and chronology can be summarised as follows:

    i. The appellant first came to the UK in 2001 at the age of 12, with his parents and sister. He returned to Bosnia and Herzegovina in 2006.

    ii. The appellant re-entered the UK clandestinely, either in 2007 or 2008, having been refused entry clearance in March 2008. He met and married Ms KS, and their daughter SM was born in 2010. However, the relationship broke down and he has not seen his daughter since 2015.

    iii. He had a subsequent relationship with Ms KB, and their child HB was born in 2013. That relationship also broke down and he has not seen his son since 2017.

    iv. He was arrested as an illegal entrant when encountered in February 2015.

    v. He is currently in a romantic relationship with GS, who has a child LS from a previous relationship, and both of whom have recently been granted settled status in the UK under the EU Settlement Scheme. However, he lives not with GS but with a friend.

    vi. In early 2020, he issued Family Court proceedings for contact with this son.

7. The appellant's representative accepted that Ms GS was not a partner for the purposes of Appendix FM of the Immigration Rules. Neither was the judge satisfied that he had a genuine and subsisting parental relationship with her child, LS, that could meet the

requirements of the Rules. These findings have not been challenged. The fact that the appellant could not meet the requirements of the Rules was a relevant consideration in the article 8 proportionality balancing exercise outside the Rules.

8. In respect of the claim of family life, Judge Cox accepted that the appellant enjoyed a genuine and subsisting relationship with his current partner but concluded on the evidence that neither that nor any other relationship, was sufficient in the circumstances to constitute family life engaging article 8. The judge took into account that whilst they see each other 3-4 times a week and intend to live together at some uncertain time in the future, the appellant did not in fact live with GS or her son. The judge also accepted that the appellant had a close relationship with the child LS and was a positive male influence on him. However, whilst his relationship with GS was "developing", the judge did not accept their relationship could be described as a family unit or family life engaging article 8. In reaching this conclusion, the judge took account of the absence of evidence that the appellant had any say or control in the direction of LS's upbringing and that when GS worked, the child was cared for not by the appellant but another. On the evidence the judge did not accept that the appellant had a parental relationship or played any parental role.

9. With regards to the appellant's relationship with his biological children fathered as a result of previous relationships, he told the judge that his former partner refused to let him see his son, HB. The judge disbelieved the claim that the family proceedings for contact with his son had commenced in May 2019; the limited information suggested that these had only begun recently. At [63] of the decision, the judge concluded that the family proceedings "primarily represented an attempt by the appellant to bolster his chances of staying in the UK." Similarly, it appears from [39] that the appellant had only recently approached Ms KS about access to his daughter, whom he had not seen for about 5 years.

10. In the premises, the judge was not satisfied that despite the low threshold, his relationships with GS, LS, or either of his two biological children were such that the refusal decision was a sufficient interference with family life so as to engage article 8.

11. The judge went on to consider private life, considering whether there were very significant obstacles to integration pursuant to paragraph 276ADE, taking into account health issues, and, outside the Rules, with reference to the public interest considerations under s117B of the 2002 Act and that the relationship with GS began in the full knowledge of his illegal status in the UK, so that little weight could be accorded to it, or his private life in the UK. Applying the R (Razgar) v Secretary of State for the Home Department [2004] UKHKL 27 stepped approach, making a proportionality balancing exercise, taking into account the factors set out . The judge also found that there were no compelling circumstances sufficient, exceptionally, to render the refusal decision unduly harsh. Ultimately, the judge found the decision proportionate to the appellant's limited article 8 rights, such as they were.

12. The grounds of application for permission to appeal to the Upper Tribunal raise four grounds:

i. That in finding family life between the appellant, his partner and stepson did not engage article 8, the judge applied an incorrect test and failed to take into account relevant evidence;

ii. That the judge erred in considering current lack of contact between the appellant and his biological children as determinative of whether article 8 is engaged;

iii. That the judge failed to consider exceptional circumstances and failed to apply RS (immigration/family court liaison: outcome) India [2013] UKUT 82 (IAC) by making an assessment of the potential material impact of family court proceedings;

iv. That the judge failed to consider whether there were unjustifiably harsh consequences and failed to strike a fair balance between competing public and private interests.

13. At the Upper Tribunal remote hearing Ms Mottershaw, who represented the appellant in the First-tier Tribunal, made a lengthy and detailed critique of the First-tier Tribunal decision, relying on the grounds and her written submissions of 1.7.20, which, together with the oral submissions of the two representatives, I have carefully taken into account in considering the decision of the First-tier Tribunal.

14. The primary ground is the submission that the judge applied too high a test to the assessment of family life between the appellant, Ms GS and her son LS, without which a different conclusion could have been reached. Ms Mottershaw pointed to evidence in support of the appellant, including the letter from the child describing a close father-son-like relationship. However, it is clear from a reading of the decision as a whole that the judge took that evidence and other supportive evidence into account in the context of the evidence in the round. The child's letter is specifically addressed at [27] of the decision. Whilst a different judge may have reached a different conclusion, that is not the test for an error of law. I am satisfied that the finding that there was not family life sufficient to engage article 8, or one in respect of which any interference caused the refusal decision was insufficient to engage article 8, was open to the judge on the evidence and was justified by cogent reasoning. The fact is that there was no 'family unit' and even describing Ms GS as the appellant's partner could be regarded as something of an exaggeration. Whilst the appellant and Ms GS saw each other 3-4 times a week and he had a good relationship with her child, they did not and have never lived together. That the reason was to avoid a reduction in her single parent benefits is not determinative. Despite Ms Mottershaw's attempts to put a post-hearing spin on her evidence, at [29] the judge was entitled to take at face value GS's statement evidence that at some point in the future they hoped to move in together and start a family life. In other words, family life was a hope for the future. She did not attend as an oral witness in his support. The judge also took into account that the appellant had no say or control or direction of the child's upbringing and that when the mother is working his aunt looks after him. He only sometimes sees the child when he visits. The judge was entitled to conclude at [31] that the appellant did not play a parental role

and at [32] that he does not yet have a parental relationship with the child. On the evidence, the appellant had not stepped into the "shoes of a parent" as referred to in RK v SSHD [2016] UKUT 00031 (IAC)). In the article 8 proportionality balancing exercise, S117B required little weight to be accorded to family life with a partner given his illegal immigration status, a relationship entered into in full knowledge of his status. That he could not meet the requirements of the Rules was also relevant. These were all matters considered by the judge.

15. Whilst none of these factors were necessarily determinative on their own, they were all relevant in the overall assessment, together with the appellant's declared intentions for family life with Ms GS and her son. Ms Mottershaw relied on a series of case authorities set out in the grounds and her written submissions to the effect that family life is not static. However, Ahmadi [2005] EWCA Civ 1721, cited by Ms Mottershaw in support of the proposition that authorities should not inhibit the development of future family life, also stated that "where there has been no pre-existing family life and there exists only a future intention," would not be sufficient to engage Article 8. A reading of the impugned decision reveals that the assertion that the judge applied a hard-edged bright line test to family life is not sustainable; the judge set out a host of factors considered and taken into account. The judge did make a careful consideration of all the circumstances. In the premises, no error of law is disclosed.

16. With regard to the second and third grounds and the appellant's relationship with his biological children, the evidence adduced in support of any genuine family life was entirely inadequate. He had only recently sought contact with his daughter after almost 5 years and the judge found he had only recently started family proceedings for contact with his son, whom he had not seen for 3 years. Ms Mottershaw was not able to tell me exactly when the proceedings had been instituted. The evidence strongly suggested no previous interest in either of the children. Mr Clarke referred me to Mohan v SSHD [2012] EWCA Civ 1363 and the list of questions to be considered by a judge where there are family proceedings. The judge found that the appellant's motivation was not genuine interest in the children but to assist his claim to remain in the UK. There were also compelling public interest factors in this case. In the premises, little would have been gained by waiting for the outcome of family proceedings that had yet to have an effective first hearing and which the evidence suggested had been launched to frustrate the appellant's removal. Any judge would be entitled to conclude that in these circumstances there was no more than a fanciful prospect of the proceedings having a material impact; on the evidence the prospect of any meaningful relationship with either children was tenuous at best.

17. I am satisfied that there is no merit at all in the fourth ground, which in reality is no more than a disagreement with the decision of the First-tier Tribunal and an attempt to reargue the appeal. Ms Mottershaw effectively argued that removal of the appellant would have unjustifiably harsh consequences and that the judge failed to adequately assess the public interest in removal, relying on Akinyemi v SSHD [2019] EWCA Civ 2098. It was difficult to see how this point could really assist the appellant when, if anything, on the facts of this case the public interest was enhanced by the appellant's

unlawful entry into the UK. He has never had leave to remain and only sought such after being arrested in 2015. Ms Mottershaw criticised the decision, but nothing in these submissions disclosed any error of law.

18. In the circumstances and for the reasons set out above, I find no material error of law in the decision of the First-tier Tribunal so that it must be set aside.

Decision

The appeal to the Upper Tribunal is dismissed.

The decision of the First-tier Tribunal stands, and the human rights appeal remains dismissed.

I make no order for costs.

Signed: *DMW Pickup*

Upper Tribunal Judge Pickup

Date: 9 December 2020