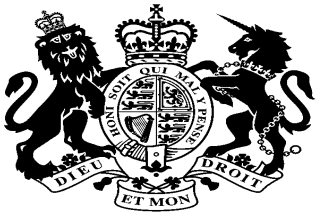

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/23941/2013

THE IMMIGRATION ACTS

Heard at Newport	**Determination Promulgated**
On 20 May 2014	**On 19 June 2014**
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Before

UPPER TRIBUNAL JUDGE GRUBB

Between

IK

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms L Fenney of NLS Solicitors
For the Respondent: Mr I Richards, Home Office Presenting Officer

DETERMINATION AND REASONS

1. Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) I make an anonymity order as the appeal includes consideration of the circumstances of a child. Unless the Upper Tribunal or Court directs otherwise, no report of these proceedings shall directly or indirectly identify the Appellant. This direction applies to both the appellant and to the respondent and a failure to comply with this direction could lead to Contempt of Court proceedings.

Background

2. The appellant is a citizen of Morocco who was born on 21 March 1989. He arrived in the United Kingdom on 14 October 2009 with entry clearance as a Tier 4 Student valid until 30 September 2010. That leave was extended thereafter until 5 October

2011. The appellant ceased his studies before his leave ran out and he, thereafter, overstayed.

3. In August 2011, he 'met' on an internet dating/friendship website "ZD". ZD is a British citizen who was born on 15 July 1989. The appellant and ZD developed a relationship over the internet and shortly before Christmas 2011 they met in person for the first time.

4. The appellant was living in Cardiff. In October 2011, he had obtained a false French ID card and he used that to obtain employment in a Cardiff restaurant. On 4 April 2012, the appellant was arrested at that restaurant on the basis that he was working illegally. At that time, he said that he was in a relationship with a woman who lived in Blackburn but he was unable to give her address or telephone number even though he had said that he had seen her the previous Sunday. It is now accepted by the appellant that that was an entirely fabricated account.

5. Following his arrest, the appellant was detained until 1 July 2012. During his time in detention, ZD visited the appellant together with her son "R" who was born on 9 November 2010. ZD was, and remains, married to R's father whom she married on 12 July 2010 but that marriage broke down 9 months later at the beginning of 2011.

6. Following the appellant's release from detention, he went to live with ZD and R. The appellant made a number of representations to the respondent, most recently on 3 December 2012 relying upon Article 8 of the ECHR based upon the appellant's relationship with ZD and R.

7. On 28 May 2013, the Secretary of State refused the appellant's application for leave to remain under Article 8 having concluded that the appellant could not meet the requirements of Appendix FM or para 276ADE of the Immigration Rules (HC 395 as amended).

The First-tier Tribunal's Decision

8. The appellant appealed to the First-tier Tribunal. A hearing took place before Judge Britton on 3 February 2014. The appellant submitted a bundle of documents including a witness statement from the appellant (pages 1-4) and ZD (pages 5-10) and a number of supporting letters (pages 29-42) from the sponsor's sister and parents and others who had either worked with the appellant or who work with the sponsor. In addition, both the appellant and sponsor gave oral evidence before the Judge.

9. It was not suggested before the Judge that the appellant could meet any requirements of the Immigration Rules. He clearly could not do so on the basis of his relationship with ZD or R or on the basis of his private life under para 276ADE.

10. Having heard the sponsor and appellant give oral evidence, Judge Britton made a number of factual findings at paras 32-37 of his determination.

11. First, he noted the appellant's poor immigration history, namely that the appellant had been an overstayer since October 2011 and had worked illegally having obtained a forged French ID card. Upon arrest, the appellant had also given an account which he now accepted was false and "a pack of lies". Further, the Judge found that the appellant had, in effect, practiced deception upon ZD as he had not told her that he was in the UK illegally, leaving her with the impression that he was here legally, until she discovered his status when he was arrested on 4 April 2012.

12. Secondly, the Judge noted that the appellant and ZD had not lived together before he was arrested. They had only done so following his release on 1 July 2012.

13. Thirdly, the Judge referred to the evidence of ZD that R's biological father did not have much contact with him. The evidence was that R saw his father once a month when ZD took him to visit his paternal grandparents.

14. Fourthly, the Judge, taking into account the appellant's deceptive behaviour both as regards his immigration history, concluded (at para 36) that the appellant had:

> "used this dating system to get in contact with a British national to enable him to stay in this country".

15. Although the Judge accepted that ZD's intentions were "honourable", he did not accept that the appellant's intentions were also.

16. Finally, at para 57, Judge Britton accepted that it was in R's "best interests to be with his mother and have a relationship with his father". The Judge accepted that it was not practical for ZD and R to live in Morocco but that they could keep in contact with the appellant using the modern means of communication and with possible visits.

17. Judge Britton concluded that the respondent's decision was a proportionate interference with the appellant's private and family life.

The Appeal to the Upper Tribunal

18. The appellant sought permission to appeal to the Upper Tribunal essentially on the basis that the Judge had failed to consider the impact of the appellant's removal upon R and ZD. In addition, it was argued that the Judge had made a finding "clearly against the evidence" that R had a relationship (akin to father and son) with his biological father. Finally, it was argued that the Judge had failed to consider the appellant's relationship with ZD as at the date of hearing.

19. On 10 March 2014, the First-tier Tribunal (DJ J M Lewis) granted the appellant permission to appeal to the Upper Tribunal. At para 5 of his reasons, DJ Lewis stated that it was arguable that the Judge had failed properly to consider Article 8 of the ECHR. He said this:

> "…It was not sufficient to find, in paragraph 36, that the relationship with [ZD] was one which the Appellant was using to remain in the UK; in paragraph 37 that the Appellant in Morocco could remain in contact with [ZD] and [R] in the UK; and

> therefore at paragraph 38 that any interference with the Appellant's private and family life was proportionate. The judge should have reached findings on the existence, or not, of both private and family life and, if he found them to exist, on the effect not only upon the Appellant but also upon [ZD] and [R]. He had to consider both the Immigration Rules and, if finding against the Appellant under them, Article 8. He had also to consider paragraph 353B."

The submissions

20. On behalf of the appellant, Ms Fenney submitted that the Judge had failed to consider Article 8 properly.

21. Relying on her grounds, she submitted that the Judge had failed to have regard to the effect upon ZD and R if the appellant had to leave the UK. The Judge had failed to take into account the circumstances of the relationship between R and his father which was that R's father failed to see him on a number of arranged occasions. She referred me to a text message at page 43 of the bundle where R's father had failed for a second time to meet R. It was wrong to see their relationship as one 'akin to father and son'. Ms Fenney submitted there was a strong relationship between R and the appellant. She referred me to the evidence in the appellant's bundle which demonstrated that R perceived the appellant to be his father. He had referred to the appellant as "daddy" during the hearing. Ms Fenney submitted that R had already lost one father and it was not proportionate that he should lose another if the appellant were removed.

22. Further, she submitted that the Judge had failed to consider the impact upon ZD if she was left to look after R alone, in particular there were childcare costs and she would not be able to work. Ms Fenney also reminded me that the evidence was that the biological father of R owed a substantial amount of CSA payments and the evidence that he sometimes paid and sometimes did not.

23. Mr Richards, on behalf of the respondent submitted that the Judge had made a number of clear findings, in particular in paras 33-36. The Judge had accepted at paragraph 37 that it was in R's best interest to be with his mother and to have a relationship with "his father" – the latter was clearly a reference to R's biological father. There was no confusion, Mr Richards submitted, as suggested in the grounds that the Judge was here really referring to the relationship between R and the appellant. Mr Richards submitted that given the Judge's findings about the appellant's immigration history and that he had fostered the relationship with ZD in order to remain in the UK, it was hard to envisage the Judge coming to any other conclusion than that the appellant's removal was proportionate. Mr Richards accepted that the Judge had not considered whether there were "exceptional" or "compelling" circumstances in order to justify the grant of leave outside the new Article 8 Immigration Rules. However, he submitted that there could be no doubt on the facts as found that there was nothing compelling or exceptional about the circumstances to justify such a grant of leave.

24. In response, Ms Fenney submitted that if, indeed, the Judge had meant in paragraph 37 to refer to the relationship between R and his biological father as being in R's best interest, that only emphasised that the Judge had failed to consider the relationship

between R and the appellant and whether the latter's removal was in R's best interest.

25. At the conclusion of the submissions in relation to error of law, I invited both Ms Fenney and Mr Richards to make any submissions they wished in relation to how I should remake the decision if I concluded that there was an error of law. I set those out below.

Discussion

Error of Law

26. In applying Article 8 of the ECHR, the Judge was required to make factual findings about the nature of the relationships between ZD and the appellant and R and the appellant. In particular, the Judge was required to find whether "family life" was established and, if it was, whether the appellant's removal amounted to an interference with that family life. In addition, if the Judge's findings led him to conclude in the appellant's favour that Article 8.1 was engaged, in considering Article 8.2 the Judge had to determine whether it was established that the appellant's removal would be proportionate. As part of that assessment, it was necessary for the Judge to make findings in relation to R's 'best interests'. Those 'best interests' were a 'primary consideration' (see ZH (Tanzania) v SSHD [2011] UKSC 4 and s.55 of the Borders, Immigration and Asylum Act 2009). R's best interest could, however, be outweighed by other factors (see ZH (Tanzania) *per* Baroness Hale at [33] and Zoumbas v SSHD [2013] UKSC 74 at [10]). It was also incumbent upon the Judge to take into account the impact, if any, upon the rights of ZD (see Beoku-Betts v SSHD [2008] UKHL 39).

27. At paragraph 30, Judge Britton set out Article 8 and at paragraph 31 he set out the well known five-stage test from Lord Bingham of Cornhill's speech in R (Razgar) v SSHD [2004] UKHL 27 at [17]. I have already noted that the Judge made his factual findings at paras 32-37. It is possible that the Judge accepted that there was family life between the appellant and ZD and between the appellant and R. However, he does not make any express finding in that regard. But, even if such a finding were implicit, in my judgement, the Judge fell into error in two respects.

28. First, the Judge only referred to R's best interests at para 37 of his determination. There, he considers R's best interests to be:

> "with his mother and have a relationship with his father."

29. It is clear to me that the reference to R's "father" is a reference to his biological father. So, two sentences later in paragraph 37 the Judge refers to "the appellant" and the maintenance of contact between the appellant and ZD and R if the appellant were removed to Morocco. There was evidence before the Judge, and I will return to it shortly, concerning the relationship between R and the appellant. That was set out in both the witness statement of the appellant and ZD and also in their oral evidence, in particular at paras 23 and 26 respectively. I accept Ms Fenney's submission that the Judge has not made adequate findings I respect of R's best interests. In his findings, the Judge did not grapple with that evidence and reach any finding on

whether it is in R's best interest that the appellant should continue to live with him and ZD in the UK.

30. Secondly, there was evidence before the Judge, and again I will return to this shortly, concerning the potential impact upon ZD in terms of her work and finances if the appellant were removed and unable to look after R. Again, in his findings at para 32-37, the Judge neither grappled with this evidence nor made any explicit finding in relation to it. The failure to do so amounted, in my judgement, to an error of law.

31. I do not accept Mr Richards' submission that any error was necessarily immaterial as the Judge was bound to reach the same conclusion. It is wholly unclear to me what view the Judge would have formed had he taken into account R's best interest and the impact on ZD if the appellant were removed. Consequently, for these reasons the Judge's decision to dismiss the appeal under Article 8 involved the making of an error of law and cannot stand. That decision is set aside.

32. I must, therefore, remake the decision.

Remaking the Decision

33. I heard submissions on this issue from both representatives.

34. Ms Fenney relied upon the evidence concerning what, she submitted, was a strong relationship between R and the appellant. She relied upon the supporting evidence for that and also that R's biological father lacked interest in him and she referred me to a text message at page 43 of the bundle where R's father had failed for a second time to meet R. Ms Fenney submitted that R had already lost one father and it was not proportionate that he should lose another if the appellant were removed.

35. Mr Richards submitted that there was no independent evidence as to the likely impact upon R of the appellant's removal. He accepted that it might well be right that it was in R's short term best interest to have the appellant present. However, given the Judge's adverse findings in respect of the relationship between ZD and the appellant, he submitted that it was difficult to conclude that it was in R's best interests in the longer term. In any event, Mr Richards submitted that the best interests of R, whilst a 'primary consideration', were not determinative. Against those best interests had to be set the negative facts referred to by the Judge namely the appellant's poor immigration history, his deception of ZD and his fostering of a relationship with ZD in order to remain in the UK. Mr Richards submitted that there were no "compelling" circumstances which merited the grant of leave outside the Immigration Rules under Article 8.

36. As I have already indicated, the evidence is set out in the appellant's bundle, in particular in the appellant's witness statement and ZD's witness statement together with the supporting letters (at pages 1-4; 5-10 and 29-42 respectively). In addition there is the oral evidence given by the appellant and sponsor which is recorded in Judge Britton's determination.

37. The appellant relied upon Article 8 of the ECHR. The correct approach to applying Article 8 is set out in Lord Bingham's speech in Razgar at [17] as follows:

(1) Will the proposed removal be an interference by a public authority with the exercise of the applicant's right to respect for his private or (as the case may be) family life?

(2) If so, will such interference have consequences of such gravity as potentially to engage the operation of Article 8?

(3) If so, is such interference in accordance with law?

(4) If so, is such interference necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights of freedoms of others?

(5) If so, is such interference proportion ate to the legitimate public end sought to be achieved?"

38. The burden of proof is upon the appellant to establish that Article 8.1 is engaged, namely that he has private and family life in the UK and that the decision interferes with that private and family life sufficiently to engage Article 8. Thereafter, it is for the Secretary of State to establish any such interference is justified as being in accordance with the law and for a legitimate aim set out in Article 8.2 and, if so, that any interference is proportionate.

39. In relation to the issue of proportionality, that as Lord Bingham pointed out in Razgar at [20]:

> "involve(s) the striking of a fair balance between the rights of the individual and the interests of the community which is inherent in the whole of the Convention. The severity and consequences of the interference will call for a careful assessment at this stage. "

40. In assessing proportionality, the "best interests" of any child are a primary consideration although countervailing factors maybe sufficiently strong to outweigh a child's best interest (see ZH (Tanzania) and Zoumbas).

41. It is not suggested that the appellant can succeed under the family life provisions in the Immigration Rules (Appendix FM) or on the basis of his private life (para 276ADE). Those rules represent a statement of the public interest endorsed by Parliament and proper weight must be given to that in assessing proportionality. It will only be if there are "exceptional" or "compelling" circumstances that a grant of leave under Article 8 outside the Rules will be justified (see MF (Nigeria) v SSHD [2013] EWCA Civ 1192; R (Nagre) v SSHD [2012] EWHC 720 (Admin); Gulshan (Article 8 – new Rules – correct approach) [2013] UKUT 00640 (IAC)).

42. The first issue concerns the nature of the relationship between the appellant and ZD and between the appellant and R. As regards the former, the evidence before the Judge (which I did not understand to be disputed) was that the appellant and ZD met on an internet site in August 2011; a relationship developed and they physically met shortly before Christmas in 2011. At that time, they did not live together. However, the evidence of both the appellant and ZD was that their relationship was developing. When the appellant was arrested on 4 April 2012, the evidence of ZD was that she visited him with R and the appellant said that she brought him clothes and money to purchase extra necessities and they talked over the telephone each

day. Following the appellant's release on 1 July 2012, the appellant and ZD had lived together at the same address with R, ZD's son. Although the Judge found, at paragraph 36 of his determination, that ZD's intentions were "honourable", he went on to find that the appellant was using the relationship in order to remain in the UK. The Judge made no finding, however, as to whether the relationship actually amounted to family life. It does not seem to me that the Judge's finding is necessarily inconsistent with a finding of family life. His finding was rather that the appellant's relationship served his immigration purpose of seeking to remain in the UK; a relationship which could exist and have substance despite it suiting the appellant's immigration objectives. In my judgement, it is not possible to form a view on the relationship between ZD and the appellant without also looking at their whole circumstances, in particular how the appellant has, if at all, integrated into a unit consisting of ZD and R. The Judge, of course, did not consider, at least in his findings, the evidence about the appellant's relationship with R.

43. That latter evidence is, in my judgement, clear. The appellant has become a father figure for R. He provides ZD with practical support by looking after R whilst ZD is at work. At least, he does so for some of the time. In her oral evidence, ZD explained that she worked between 12 and 24 hours per week. R went to nursery between 1 pm and 3 pm every day but that the appellant looked after him otherwise whilst she was at work. The evidence was that R called the appellant "daddy".

44. By contrast, R's biological father appears to have little to do with R. He and ZD split up shortly after R was born and, at best, he sees R once a month when ZD takes R to his paternal grandparents. I accept ZD's evidence concerning the difficulties she has encountered in making R's biological father meet his financial obligations to R, I am less impressed with the suggestion that the evidence shows that R's biological father wants little to do with R. It would be wrong to extrapolate from the one text exchange showing that R's biological father missed two possible meetings with R so as to conclude that R's father is not interested in R in the future. His is clearly an absent parent and, perhaps, a less that enthusiastic absent parent but the evidence goes no further than that in my view.

45. That said, I am satisfied on the evidence that the relationship between ZD, R and the appellant is that of a *de facto* family unit. I accept, therefore, that there is family life between the appellant and ZD and between the appellant and R.

46. The Judge found that it was not practical for ZD and R to live in Morocco. That is a finding that is not challenged. It is clearly correct and I agree with it. It would not be reasonable to expect ZD to relocate to Morocco. She is a British citizen and R is also a British citizen. Any relocation by R would necessarily disrupt his future relationship with is biological father in the UK.

47. For these reasons, I am satisfied that Article 8.1 is engaged.

48. The respondent's decision is in accordance with the law and in furtherance of a legitimate aim namely the economic well-being of the country. The crucial issue is whether the decision is proportionate.

49. As I have already indicated, I accept that there is a family unit consisting of ZD, R and the appellant. The Judge found that it was in R's best interests to be with his mother and to have a continuing relationship with his biological father. I entirely agree with that finding. Mr Richards also acknowledged, albeit tentatively, that it might be in R's short term best interest to continue to live with the appellant. That, in my judgement, is also correct. I accept that the appellant has become a father figure for R at least since he started to live with ZD and R from 1 July 2012. I accept that R sees the appellant as fulfilling the role of a father. I accept that the appellant and R have formed a strong bond together. I accept that the appellant's removal would have some impact upon R who would lose the appellant as a father figure. The only means of maintaining contact would be through electronic means such as Skype. Whilst that would provide some contact it could not be the substitute for the involvement that the appellant currently has in R's life. That said, I also accept Mr Richards' submission, that there is no specific evidence of any impact, particularly in terms of its nature or severity upon R if the appellant is removed. But, as I say, I do accept that there will be some impact upon R given the role that the appellant currently plays in his life and that R's best interests would be best served by the appellant's continued involvement in his life.

50. Ms Fenney relied upon the evidence which demonstrated the impact, she submitted, upon ZD (and through her on R) if the appellant were removed. ZD works. The impact upon ZD's ability to work is, however, not entirely clear. In her witness statement ZD states that if the appellant is removed:

> "I would never be able to work and would be a full time mother to [R]."

51. In her oral evidence, ZD said that before the appellant came to live with her she worked part time (15 hours) working two days per week. She had a childminder for one day and her mother looked after R for the other day. She said that she now worked more hours between 16 and 24. R went to a nursery between 1 pm and 3 pm every day and went to his maternal grandmother on a Saturday. In her witness statement, ZD says that she has a tax credit which she uses in order to pay for R to go to the playgroup. ZD lived next door to her sister and, it would appear from their addresses, in the same area as her parents. In their letter of support (at page 38), ZD's parents note that ZD's working tax credit was reduced as a result of the appellant moving in with her and she has had to increase her working in order to compensate for that loss of income. They state that they all work and only look after R on Sundays. It appears, therefore, that before the appellant moved in with ZD she was able to work, employing a childminder for one day and having her mother look after R for the other day. She has only increased her working time in order to compensate for the loss of working tax credits because the appellant now lives with her. If he did not live with her, in my judgement, the evidence does not show that she would be unable to continue to work, at least on the part time basis that she did before the appellant moved in with her, and organised necessary childcare for R remembering always that now (as opposed to then) he attends nursery between 1 pm and 3 pm. ZD managed before the appellant moved in and I am satisfied that she would manage again financially and with childcare arrangements if the appellant were removed.

52. Of course, ZD would lose the appellant as her partner if he were removed to Morocco. Again, modern forms of communication would not be a substitute for the relationship that she now enjoys with the appellant.

53. The appellant's relationship with R has been relatively short and R is now only 3 ½ years old. In the absence of any evidence to the contrary, I see no basis for finding that R will necessarily suffer irreparably if he is brought up by his mother. ZD's family lives nearby and R, it is said, has a close relationship with his maternal grandparents. He also visits his paternal grandparents once a month and, despite his dilatoriness, R's biological father also has continuing contact with R. There is, therefore, a family environment in which ZD and R exist and in which R will continue to be brought up.

54. That said, in this case the public interest is strong. First, the appellant cannot meet the requirements of the Immigration Rules. Secondly, he has been in the UK illegally since October 2011. He, at least, formed a relationship with ZD and R in full knowledge that he had no legal basis for being in the UK and, as the Judge found, in order (despite its genuineness) to facilitate his continued residence in the UK. Thirdly, the appellant has practiced deception both in obtaining work by purchasing and using a false French ID card and also in deceiving ZD about his immigration status until it necessarily came out when he was arrested in April 2012.

55. I must, therefore, balance the public interest against the impact I have identified for ZD and that R's best interests, at least in the short term, would be to have the appellant in the UK. Bearing in mind the family circumstances of ZD and R in the UK and the strong public interest flowing from the appellant's inability to meet the requirements of the Immigration Rules and his own immigration history, I am satisfied that the appellant's removal is a proportionate interference with the family life of the appellant, ZD and R. In my judgement, the strength of the public interest outweighs R's best interests in this appeal. The circumstances are not 'exceptional' or 'compelling' so as to justify the grant of leave under Article 8 of the ECHR outside the Immigration Rules.

Decision

56. The decision of the First-tier Tribunal to dismiss the appellant's appeal under Article 8 involved the making of an error of law. That decision is set aside.

57. I remake the decision dismissing the appellant's appeal under Article 8 of the ECHR.

Signed

A Grubb
Judge of the Upper Tribunal

Date:

To the Respondent
Fee Award

As the appellant has not succeeded in his appeal, I make no fee award.

Signed

A Grubb
Judge of the Upper Tribunal

Date: