Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/14290/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 30 January 2018	**On 06 February 2019**

Before

DR H H STOREY
JUDGE OF THE UPPER TRIBUNAL

Between

MR DONALD BRAKAJ
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr A Jafar, Counsel, instructed by Norton Folgate Solicitors
For the Respondent: Mr S Kotas, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a national of Albania who entered the UK illegally on 6 January 2015. In September 2016, he made an asylum claim and this was refused on 11 October 2016. On 19 April 2017, he made a human rights claim in an application for leave to remain in the UK on the basis of family life with his partner, CT. On 18 October 2017 the respondent refused that application. He appealed. In a decision sent on 25 June 2018 Judge Ross of the First-tier Tribunal (FtT) dismissed his appeal. Judge Ross accepted that the appellant had a genuine and subsisting relationship but considered that there were no

insurmountable obstacles to family life with his partner outside of the UK. As regards CT's daughter, C, he accepted that the appellant and her were very fond of each other and that the appellant was a positive influence on his step-daughter's life, but concluded that the appellant had not shown he had parental responsibility and accordingly he did not have a genuine parental relationship with a qualifying child either under the Immigration Rules or s.117B(6) of the NIAA 2002. The judge considered that it was reasonable to expect the appellant's partner, CT, and her daughter, C, to relocate to Albania.

2. In a decision posted on 29 November 2018, I set aside the decision of the FtT judge for material error of law. I found that the judge had failed to apply or make a best interests of the child assessment; had erred in stating that it was reasonable to expect C, a British citizen child, to leave the UK; that the judge's error as regards reasonableness clearly had a potential impact on his treatment of the appellant's circumstances outside the Rules; and that the judge's focus on the issue of parental responsibility clouded his approach to the test set out in section 117B(6) of the Nationality, Immigration and Asylum Act 2002 which requires or an appellant to establish, not parental responsibility, but "a genuine subsisting parental relationship with a qualifying child".

3. I stated at para 7 that:

> "I am in agreement with both representatives that aside from the issue of the nature and extent of the appellant's relationship with C there is no dispute about the surrounding facts and circumstances. For this reason, I consider that the case should be retained in the Upper Tribunal and will be listed for a two-hour hearing with a view to C attending as a witness and giving evidence about the nature and extent of her relationship with the appellant and with her biological father. It will then be open to the parties to make further submissions, including as to the relevance or otherwise of the findings of Judge Lewis on 14 March 2017 that there was no family relationship between the appellant and C (see paragraph 49)."

4. At para 8, I stated that the case was retained in the Upper Tribunal with a direction allowing for time for oral testimony to be taken from the child, C.

Oral testimony

5. At the hearing before me I heard oral evidence from the appellant's partner, CT, his step-daughter, C, and the appellant.

6. His partner, CT, said that she had undergone therapy as a result of the abusive nature of her relationship with C's biological father. This experience had made her very protective towards her daughter; she had had to get away from him and she had taken C to a new environment. C's father had played no part in C's life since 2007 and he had told her he now had a new family. Since the appellant had come into her life, she had needed less medication. After a few months from when they met in July 2015 she and the appellant and her daughter had become a close family unit. They are now married (they married in July 2017). The appellant had been an enormous help to C, who suffers from panic attacks and bed-wetting. He has brought stability and had become the father C had never had. He helped C with her schooling and with her routines and other aspects of her everyday life, ensuring she follows a routine and comes home safe. He has played an

active part in helping her choose which college to go to. C had been very distressed when the appellant had been detained for immigration purposes, but he had called her every day to reassure her that everything was OK and, when he was released on bail to the house of a friend nearby, he had sought to minimise C's concerns about him not living there by coming around in the morning before she got up and staying in the evening until she had gone to sleep. The appellant had told CT there were problems with his immigration status when their relationship started getting serious. She realised there was therefore a risk in continuing to let her and her daughter's relationship with the appellant deepen, but he had been the best thing that had happened to her and her daughter.

7. In her oral evidence C confirmed that she had turned 18 earlier in January, that the appellant was a father to her and helped him with her education and with everyday support. He had helped her deal with things like a fall-out she had had with a friend.

8. The appellant's oral evidence outlined the help he had given C with her choice of college and courses and also with her everyday problems. He said he had tried to shield C from knowing about his immigration problems sol that she did not get too upset.

Submissions

9. Mr Kotas submitted that as C had just turned 18 the appellant could no longer benefit from s.117B(6) of the 2002 Act as its personal scope was confined to parents of children under 18. He did not dispute that the appellant had established family life in the UK but contended that that was primarily with CT and the respondent's position remained that the appellant's relationship with C was not a parental one. The support the appellant provided to her was more akin to that from a nanny or a carer. The witnesses had only been able to specify limited examples of his role in making key decisions affecting C and in giving her advice and support, mainly in the context of education: "A parent does so much more", said Mr Kotas. He submitted further that on the strength of the evidence given by the appellant and CT, the former had been careful, once he began a serious relationship with CT, not to barge in and try and take control which in Mr Kotas's view conveyed that his relationship was more supportive than parental. In any event, the bare fact of the matter was that the appellant and CT entered into their relationship at a time when his immigration status was precarious and as such their family life was to be given less weight than otherwise. He accepted that CT is well-settled in her life in the UK and has two part-time employments and that it would not be at all in C's best interests, or reasonable, to expect her to leave the UK, given her vulnerabilities and the fact that she was still involved in studies at college and re-taking some GSCE's and was clearly still dependent on her family unit. However, he submitted that the appellant's grounds did not challenge the judge's finding that there were no insurmountable obstacles to the family resuming family life in Albania. The medical evidence was thin and fell well short of showing that CT's and C's health circumstances were severe. The fact that the appellant could not meet the requirements of the Rules meant that greater weight had to be given to the public interest. The emphasis placed in **KO(Nigeria)** [2018] UKSC 53 on the situation in the "real world" was important in this case because there was no expectation in this case that C would have to leave the UK.

10. Mr Jafar submitted that the appellant had established that he had a genuine and subsisting parental relationship with C as well as a family life with CT. The evidence was that the appellant was fully involved as a parent in C's life. The proportionality assessment required under Article 8 was a highly fact-sensitive one and the surrounding circumstances, not disputed by the respondent, were that, until the appellant came along, C was a single parent suffering from depression following an abusive relationship and was looking after a daughter who also had psychological problems. There was a now strong family life between the three of them and it was plainly not reasonable to expect C to go to Albania, and her rights as a British citizen should not be downplayed. Given her vulnerability, it was important not to treat her as suddenly transformed into a mature non-vulnerable adult just because she had recently turned 18. If the FtT judge had not fallen into legal error, the appellant would a have stood to benefit from s.117B(6) and that was still a relevant factor in the proportionality assessment.

My assessment

11. I have a very considerable body of evidence before me in this case, now added to by the oral testimony of the appellant, CT and C. The background evidence includes a number of letters from friends and acquaintances who live in the same village attesting to the fact that the appellant has become a father figure to C and plays an active role in C's life in her school, college and community life.

12. The documentary evidence also includes a letter from a doctor concerning C confirming that the appellant is an important adult figure in C's life and that C has needed specialist mental health support due to the uncertainty over the appellant's immigration status.

13. The first issue I have to address is the nature of the relationship the appellant has with CT and C.

14. Having considered the evidence as a whole, I am satisfied that the appellant has formed strong family life ties with CT. They met in July 2015 and began a serious relationship within a few months and married in July 2017, they have lived together apart from the first few months of their relationship and for a period when he was in immigration detention and when he was required to stay at a bail address nearby. I am also entirely satisfied that the appellant has a genuine and subsisting parental relationship with C and that this relationship has existed for several years. (For the sake of completeness, I note that Mr Kotas did not seek to rely on the findings made by a previous judge regarding the appellant's relationship with C and, in view of the further evidence that has become available in the present appeal proceedings, I consider that it was entirely right for him not to seek to rely on them). I cannot accept Mr Kotas's submissions that the appellant's relationship is not comparable to that of a father. That is so for more than one reason. First, the case of **R(on the application of RK) v SSHD** (s.117B(6); "parental relationship") IJR [2016] UKUT 31 (IAC) makes clear that the fact that a person is a step-parent does not as such preclude them from having a parental relationship. At paras 43-45 UTJ Grubb stated:

> "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."
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> 44. If a non-biological parent ("third party") caring for a child claims such a relationship, its existence will depend upon all the circumstances including whether or not there are others (usually the biologically parents) who have such a relationship with the child also. It is unlikely, in my judgment, that a person will be able to establish they have taken on the role of a parent when the biological parents continue to be involved in the child's life as the child's parents as in a case such as the present where the children and parents continue to live and function together as a family. It will be difficult, if not impossible, to say that a third party has "stepped into the shoes" of a parent.
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> 45. It is not necessary to consider more fully the position of a step-parent or partner of the primary carer of a child when a family has split after separation or divorce of the parents. That is not this case. That situation may, depending upon the circumstances, present a persuasive factual matrix for there to be a "third parent". The respondent's guidance differentiates between situations where the non-residential biological parent plays no (or no meaningful) continuing role in the child's life and where he or she does. In the latter situation, it is said that the step-parent or new partner would be unlikely to have a "parental relationship". Whilst each case will be fact sensitive, I do not inevitably see the virtue of the argument (other than as a numerical limitation of parents to no more than two) which excludes a step-parent or partner in this latter situation from being in a "parental relationship" if that is the substance of the relationship even where the non-residential biological parent continues to play some role. The issue will be fact sensitive and is best worked out in a case where it properly arises for decision."

15. I observe that in this case, we are not concerned with a "third parent" scenario since the biological father has not been involved in C's life since 2007. Second, despite Mr Kotas's submission that a father is someone who would be doing "much more", the evidence in this case satisfies me that the appellant is doing everything that could be expected of a father and that he has provided C with a father figure she previously lacked. Until the appellant became part of her life C had no father in her life and it is very clear that she now regards him as a father and that their emotional bond is in substance one of father-daughter. Furthermore, I am also satisfied that the appellant has provided an important missing element to the family unit previously made up of CT and C as single mother and child. In this regard, I would observe that I did not find the inability of the three witnesses to give detailed examples of how the appellant played an active role in C's life to be significant since it was very clear from the evidence as a whole that he has been

involved in C's daily life for some time, doing precisely the things actively involved parents do with their teenage children, and indeed, no doubt in view of C's vulnerability, has been exercising more care and supervision than is normally the case.

16. It is clear that the decision of the respondent represents an interference in the appellant's family life.

17. The next – and the central - issue in this case is whether that interference is proportionate.

18. In assessing proportionality, I have to take into account that the appellant has not shown he meets the requirements of the Immigration Rules and hence the public interest weighing against him is stronger for that reason. I must also take into account that he has a poor immigration history and has only been in the UK since early 2015.

19. On the other hand, Mr Kotas's submission makes clear that the respondent now accepts that it would not be reasonable to expect CT and C to leave the UK and live in Albania - CT because she is a well-settled British citizen with two part-time jobs and C because she is currently in full-time education. Although Mr Kotas properly submits that neither CT nor C have serious mental health issues, he does not dispute that C is a vulnerable young adult and in any event, I am entirely satisfied, particularly having seen and heard her give oral evidence, that the evidence establishes as much. The change in position on the part of the respondent as regards reasonableness in respect of CT and C being expected to leave the UK, is important because it indicates to me that there would be insurmountable obstacles to the family moving to Albania. (I consider I am entitled to revisit this issue, since the appellant's grounds of appeal before the FtT judge did contend that there would be insurmountable obstacles in the way of the CT and C resuming family life in Albania and the position now stated by the respondent through Mr Kotas warrants that this issue be revisited.) This change in the respondent's position as regards reasonableness also indicates that the principal scenario envisaged by the respondent now involves the family being split. In my judgement, if the appellant is required to leave the UK, the family life of CT and C will be significantly disrupted and it is likely that C's mental health anxieties (which centre on concerns she will lose the father figure in her life) will continue or worsen. I shall return to this scenario when addressing a related point made by Mr Kotas regarding s.117B(6).

20. Mr Kotas is correct to submit that I cannot decide this case by application of s.117B(6) because C is now 18 and so the appellant falls out with that provision's personal scope. However, I cannot agree with him that the appellant's historical position in relation to s.117B(6) is irrelevant. Had the FtT judge correctly applied the law when hearing the case in June 2018, he would have had to conclude that (i) it was not reasonable to expect C, a British citizen child, to leave the UK; and (ii) that the appellant had established a genuine and subsisting parental relationship with C and so fell within the personal scope of s.117B(6); and that (3) by virtue of the appellant meeting the requirements set out in s.117B(6), the decision could not be said to be a proportionate one. Indeed, had I heard this case a bare two weeks ago, I would also have been required to squarely apply s.117B(6) in the appellant's favour. Whilst I must assess the appellant's circumstances as at the date of

the resumed hearing before me (which means that the appellant can no longer benefit from s.117B(6)), I consider this recent historical backdrop reduces the weight to be attached to the public interest factors in play in this case. I would also observe that during the period since the appellant began a genuine parental relationship with C and whilst she was still under 18, her best interest clearly lay in remaining in the UK with both her parents.

21. Mr Kotas is right to highlight that the appellant formed his relationship with CT and C at a time when his immigration status was a precarious and that he is a failed asylum seeker. Precariousness significantly impacts on the weight to be accorded to family as well as private life: see **Rajendran** [2016] UKUT 138. On the other hand, the appellant's English is competent and even though he has no employment (he is not permitted to work) he is not dependent on the state. It would thus appear he can benefit to some extent from the limited degree of flexibility afforded by s.117A(2): see **Rhuppiah** [2018] UKSC 58. Further, none of the public interest considerations weighing against him mean that his circumstances can be assimilated to those of a parent of a non-British citizen young person – he is a parent who was playing a parental role in C's life for several years before she turned 18. In my judgement the appellant's historic ability to meet the requirements of s.117B(6) is relevant and indeed provides a compelling circumstance because, had the law been correctly applied to the facts of his case when dealt with by the FtT judge as recently as June 2018, the appellant would have succeeded in his appeal, especially given the context of a family life situation where the appellant's presence in CT and C's lives had clearly provided real stability to a family unit that was hitherto lacking.

22. Mr Kotas drew my attention to the reported UT case of **SR (subsisting parental relationship - s117B(6))** Pakistan [2018] UKUT 334 (IAC), anticipating that I would no doubt have it in mind when making my own decision in this case. He said that he would respectfully take issue with what UTJ Plimmer said at para 51 when she stated that:

> "… it is difficult to see how section 117B(6)(b) can be said to be of no application or to pose a merely hypothetical question. Section 117B(6) dictates whether or not the public interest requires removal where a person not liable to deportation has a genuine and subsisting parental relationship with a qualifying child. The question that must be answered is whether it would not be reasonable to expect the child to leave the UK. That question as contained in statute, cannot be ignored or glossed over. Self-evidently, section 117B(6) is engaged whether the child will or will not in fact or practice leave the UK. It addresses the normative and straightforward question - should the child be "expected to leave" the UK? "

23. Mr Kotas submitted that this was not consistent with what Lord Carnwath had said in **KO (Nigeria**) at para 19 about needing to apply the reasonableness test in the "real world". I have two difficulties with his argument as applied to the circumstances of this case. Firstly, his own submission acknowledged that it would not be reasonable to expect C (or CT) to leave the UK and it seems to me that provides a complete answer to the "ultimate question" regarding reasonableness seen to be critical by Lord Carnwath in para 19 (with reference to what Lewison LJ had said in **EV(Philippines)**[2014] EWCA Civ 874 at para 58); the fact that C is now 18 does not on the facts of this case alter the unreasonableness of expecting them to leave the UK . Second, the salient "real world"

circumstances in this case are surely that: there is one parent with a right to remain in the UK (she being a British citizen); a child who is British; and a situation in which, again on the basis of Mr Kotas's own submissions, it would be necessary (in order to avoid unreasonableness) to postulate either that the appellant and C went to live in Albania without C or that the appellant went back to Albania. The first possible option was indeed one that the FtT judge thought was feasible; he referred at para 30 to the fact that C had close family members nearby, including step siblings as well as her grandfather, an uncle and aunts (the judge also mentioned the nearby biological father, but Mr Kotas does not now dispute that this man plays no role in C's life and has not since 2007). That option, however, contemplates the separation of mother and daughter and given C's psychological difficulties I consider that it would be wholly unreasonable to expect her mother and the appellant to leave her behind. Albeit now a young adult, she is still a dependant who I consider vulnerable. The second option would split the family and whilst the appellant has a poor immigration history he is not a foreign criminal and (as explained above) would have been entitled during the period 2017-2018 to have relied on s.117B(6). Additionally, as I found earlier, if the appellant is required to leave the UK, the family life of CT and C will be significantly disrupted and it is likely that C's mental health anxieties (which centre on concerns she will lose the father figure in her life) will continue or worsen.

24. For the above reasons the decision I re-make is to allow the appellant's appeal on Article 8 grounds.

25. I would observe, however, that whilst the matter of an appropriate remedy under s.8 of the Human Rights Act 1998 is for the respondent, my understanding is that the appellant would – and should - only be permitted a period of limited leave, so that he is not placed in a better position than persons have who have to meet the requirements of the Rules applicable to spouses.

Signed Date: 31 January 2019

Dr H H Storey
Judge of the Upper Tribunal