Upper Tribunal
(Immigration and Asylum Chamber)

R (on the application of Reah) v Secretary of State for the Home Department IJR [2016] UKUT 00055 (IAC)

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

Heard at Cardiff Civil Justice Centre

On 10 December 2015

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

THE QUEEN (ON THE APPLICATION OF JULIE REAH)

Applicant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation :

For the Applicant: Ms S Pinder instructed by Duncan Lewis, Solicitors

For the Respondent: Ms J Williams instructed by the Government Legal Department

JUDGMENT

JUDGE GRUBB:

1.
The applicant is a citizen of Canada who was born on 6 September 1967. In these proceedings she challenges the decision of the Secretary of State taken on 8 November 2014 refusing to grant her leave to remain under the Immigration Rules and Art 8 of the ECHR. Permission was granted by HHJ Curran QC on 1 April 2015.

Background

2.
The applicant came to the United Kingdom in August 2008 with entry clearance based upon her UK ancestry. Prior to coming to the UK, she had known a British citizen, Ian Reah. Shortly after arriving

in the UK, the applicant and Mr Reah began a relationship. Mr Reah had four children (Neil, Jasmine, Nicholas and Jessica).

3.
At the end of 2006, the applicant and Mr Reah moved in together living with three of his children (Neil, Nicholas and Jessica). At that time they were 15, 12 and 11 years old respectively.

4.
In early 2009, Mr Reah was diagnosed with motor neurone disease. This is a terminal condition and Mr Reah's condition gradually deteriorated. Having spent some time in hospital, Mr Reah returned to his home where he was looked after by the applicant with some professional support.

5.
In 2012, Mr Reah passed away. Shortly before he died, the applicant and Mr Reah were married.

6.
Throughout this time, Mr Reah's three children continued to live with the applicant and, following his death continued to do so. At the time of his death, the children were aged 18, 15 and 13 respectively. They are now 24, 21 and 20 years old respectively. They continue to live with the applicant.

7.
The evidence is that Nicholas suffers from ADHD and until 2012 was in receipt of DLA because of his condition.

8.
The applicant's initial leave to enter the UK was extended until 1 August 2011. However, that leave expired without her seeking to renew it. As a result, she became an overstayer on 2 August 2011.

9.
In 2011, the applicant formed a relationship with a new partner, David Ladd who is a British citizen. He is separated from his wife with whom his young son lives.

10.
On 15 August 2014, the applicant applied for leave to remain on the basis of her private and family life. She relied both upon her "family life" with her three stepchildren and with her new partner and his child.

11.
On 8 November 2014, the respondent refused the appellant's application. First, the respondent concluded that the applicant could not succeed under the "partner" route under Appendix FM as she was not married to Mr Ladd and they were not living together so as to meet the requirement of cohabiting for at least two years in a relationship akin to marriage. Secondly, the respondent concluded that the applicant could not succeed under the "private life" rule in para 276ADE(1). She could not establish that she had been in the UK for at least twenty years and it had not been established that there were "very significant obstacles" to her integration into Canada if she were required to leave the UK. Thirdly, and finally, the respondent concluded that there were no "exceptional circumstances" to justify the grant of leave to the applicant outside the Immigration Rules under Art 8 of the ECHR.

The Applicant's Claim

12.

The applicant's claim is set out in her detailed statement of grounds which were developed by Ms Pinder, on the applicant's behalf, in her written skeleton argument and oral submissions before me.

13.
The applicant accepts that she cannot succeed under the Immigration Rules, whether under Appendix FM as a partner or on the basis of her private life under para 276ADE.

14.
The applicant challenges the respondent's decision on essentially three grounds:

(1)
In reaching her decision that there were no "exceptional circumstances" to justify the grant of leave outside the Rules under Art 8, the Secretary of State failed properly to consider the position of the applicant's three stepchildren, in particular whether their relationships with the applicant amounted to "family life" under Art 8 and further had failed to consider their circumstances including that Nicholas suffered from ADHD.

(2)
In reaching her decision that there were no "exceptional circumstances" to justify the grant of leave outside the Rules under Art 8, the Secretary of State had wholly failed to consider the relationship between the applicant and her partner, Mr Ladd.

(3)
The Secretary of State had failed, in breach of s.55 of the Borders, Citizenship and Immigration Act 2009 (the "BCI Act 2009") to consider the best interest of the child of the applicant's partner.

15.
In the statement of detailed grounds, the applicant also contended that the respondent acted unlawfully by failing to make a removal decision which was appealable. Permission was not granted on that ground by HHJ Curran QC and Ms Pinder did not pursue that ground before me.

The Respondent's Case

16.
The respondent's case is set out in the detailed grounds of defence and the written skeleton argument and oral submission prepared by Ms Williams who represented the respondent.

17.
The respondent's position may be summarised as follows. First the Secretary of State implicitly accepted in her decision letter of 8 November 2014 that "family life" existed between the applicant and her three stepchildren. The Secretary of State had, thereafter, correctly gone on to consider whether there were "exceptional circumstances" to justify the grant of leave outside the Rules.

18.
Secondly, in determining that there were no "exceptional circumstances" the respondent, although her reasons were not given in great detail, had considered the circumstances of the three stepchildren. Their circumstances were patently not "exceptional" and it was inevitable that the applicant's claim would fail.

19.
Thirdly, it is accepted that the decision letter only addressed the position of the applicant's partner from the perspective of the Rules, however in the pre-action protocol response dated 11 December

2014, the Secretary of State had concluded that there was “no new evidence” to justify departure from her earlier decision and there was nothing in the circumstances relating to the applicant and her partner which required a consideration outside the Rules under Art 8. Further, the applicant’s claim based upon the relationship with her partner was inevitably bound to fail.

20.
Fourthly, in relation to s.55 of the BCI Act 2009 the position of the applicant’s partner was fully dealt with in para 6(vi) and (vii) of the pre-action protocol response. Again, the adverse decision against the applicant was inevitable.

Discussion

21.
There is no doubt that the Secretary of State approached the issue of Art 8 as a two-stage process first, considering the applicant’s claim under the Rules; and secondly outside the Rules under Art 8 (see, e.g. R (Nagre) v SSHD [2013] EWHC 720 (Admin) and Singh and Khalid v SSHD [2015] EWCA Civ 74).

22.
It is accepted that the applicant could not succeed under the Rules. The respondent’s reasons in relation to the second stage is set out at pages 2 – 3 of her decision letter as follows:

“ Decision on Exceptional Circumstances

It has also been considered whether the particular circumstances set out in your application constitute exceptional circumstances which, consistent with the right to respect for private and family life contained in Article 8 of the European Convention on Human Rights, might warrant a grant of leave to remain in the United Kingdom outside the requirements of the Immigration Rules. In support of your claim you state you have been responsible for 3 step children one of whom suffers from ADHD since your partner unfortunately died in 2009. This has been carefully considered, however all the children are now over 18 and no longer be classified as dependant. You have claimed it would be unfair to expect the children to return to Canada with you, however they are entitled to remain in the UK and their biological mother resides in the UK if they still require support.

It has therefore been decided that there are no exceptional circumstances in our case. Consequently your application does not fall for a grant of leave outside the rules.”

23.
Ms Pinder’s first contention is that the Secretary of State has failed to consider the position of the applicant’s three stepchildren and whether their relationships with the applicant amount to “family life”. Ms Pinder submitted that the Secretary of State had not made an explicit finding. She submitted that the case law demonstrated that an adult child could still enjoy “family life” with another (such as a stepparent) despite reaching the age of majority. She submitted that the stepchildren continued to live with the applicant, and had done so since 2002, and had not established an independent life. They were still dependent upon the applicant.

24.
I accept Ms Pinder’s contention about the proper approach to the issue of family life with adult children. Most recently in Singh and Singh v SSHD [2015] EWCA Civ 630, the Court of Appeal applying the earlier decisions of that court in Eti-Adegbola v SSHD [2009] EWCA Civ 1319 and SSHD v HK (Turkey) [2010] EWCA Civ 583 acknowledged that where “family life” existed between a child

and a parent prior to the child reaching majority, that child: “does not suddenly cease to have a family life at midnight as he turns 18 years of age” (per Sir Stanley Burnton at [24]). The Court of Appeal recognised that: “a young adult living with his parents or siblings will normally have a family life to be respected under Article 8”. However, the court went on to note that: “a young adult living independently of his parents may well not have family life for the purposes of Article 8.” In other words, the Court of Appeal acknowledged that the relationship of dependency, emotional and otherwise, usually existing between a minor child and its parent, does not disappear simply because that child attains majority. The difficulty, however, faced by Ms Pinder in making good her contention is, in my judgment, twofold.

25.
First, in considering whether the applicant has established “exceptional circumstances” the Secretary of State implicitly recognised that Art 8.1 was engaged on the basis of the applicant’s “private and family life”.

26.
Ms Pinder placed reliance upon the sentence in the refusal letter which is in the following terms: “… however all the children are now over 18 and can no longer be classed as dependent”. In my judgment, that issue was taken into account by the Secretary of State in determining whether there were any “exceptional” circumstances to justify the grant of leave outside the Rules. In doing so, the Secretary of State had necessarily moved beyond accepting that the applicant had established “private and family life” in the UK and was considering whether it was justified. I accept Ms Williams’ submission that the respondent has, albeit implicitly, concluded that “family life” existed between the applicant and her three stepchildren.

27.
Secondly, in any event, even if the respondent did not consider whether there was “family life” between the applicant and her three stepchildren, there was undoubtedly “private life” between them. Ms Pinder accepted as much based upon the Strasbourg Court’s decision in AA v UK [2012] INLR 1 at [49]. In substance, it did not matter whether the Secretary of State considered that the relationships amounted to “family” life or “private” life. Providing the respondent properly considered the relevant circumstances and whether they amounted to “exceptional” or “compelling” circumstances so as to outweigh the public interest, the labelling of the relationships was not crucial. That was recognised by the Strasbourg Court in AA at [49] and also by Sir Stanley Burnton in Singh and Singh at [25] where he said:

“… the debate as to whether an applicant has or has not a family life for the purposes of Article 8 is liable to be arid and academic. …as the European Court of Human Rights pointed out in AA , in a judgment which I found most helpful, the factors to be examined in order to assess proportionality are the same regardless of whether family or private life is engaged. The question for the Secretary of State, the Tribunal and the Court is whether those factors lead to the conclusion that it would be disproportionate to remove the applicant from the United Kingdom. I reject [Counsel for the appellants’] submission that the Upper Tribunal judge’s assessment of proportionality was flawed because she, on his case wrongly, based it on the appellants’ private life rather than their family and private life.”

28.
That, in my judgment, is a complete answer to Ms Pinder’s first challenge to the respondent’s decision.

29.
The correct focus is rather, as contended by Ms Pinder in her second submission, namely, whether the respondent's assessment of proportionality (and whether there were "exceptional circumstances") was flawed.

30.
There is no gainsaying the fact that the respondent's consideration of "exceptional circumstances" in the decision letter is relatively brief. However, there is equally no doubt that the respondent at least addressed her mind to the fact that the applicant claimed that her circumstances were "exceptional" or "compelling" because she was responsible for three stepchildren one of whom suffered from ADHD and that she had been their carer since their father (her former partner) died in 2009.

31.
Ms Pinder submitted that the Secretary of State had, in effect, misdirected herself again when she had stated boldly that: "all the children are now over 18 and can no longer be classed as dependant". Ms Pinder submitted that was inconsistent with the approach to whether "family life" existed and also failed to take into account the evidence, and in particular in the witness statements of the applicant (at pages 101 – 103 of the bundle) and of the three stepchildren (at pages 105 – 107 of the bundle) together with a letter from a GP, Dr J L Scott dated 28 July 2014, (at page 128 of the bundle) that stated:

"Nicholas has been diagnosed with ADHD, and requires supervision and support from Julie, and Jessica although legally an adult also requires family support from her stepmother."

32.
Ms Pinder also referred me to the letter from the DWP (at pages 126 – 127) showing that Nicholas had been in receipt of DLA until 26 th August 2012 and, she submitted, this demonstrates his then (and continuing) needs because of his ADHD. Ms Pinder submitted that this evidence had simply not been engaged with by the Secretary of State in reaching her decision.

33.
Although Ms Pinder's submissions are not without some force, I am unable to accept them. The Secretary of State does appear to conflate dependency with a child's minority. That fails to consider the particular circumstances of the individual and flies in the face of every day experience that even adult children before "making their own way" in the world retain close emotional ties of dependency with their parent (see, for example, AP (India) v SSHD [2015] EWCA Civ 89 at [45] per McCombe LJ). However, it was not incumbent upon the Secretary of State to refer to each and every piece of evidence relied upon. I do not accept that on a realistic reading of the decision letter it can be said that the Secretary of State has simply ignored the evidence relied upon by the applicant.

34.
In any event, I accept Ms Williams' submission that, despite the tragic circumstances in which this family have found themselves, the applicant's circumstances cannot be described as "exceptional" or "compelling", in the sense that the impact upon her and her three stepchildren if she were removed would amount to an unjustifiably harsh consequence.

35.
Each of the children is an adult. At the date of the Secretary of State's decision they were 23, 20 and 18 years of age respectively. Although Jessica and Neil have lived with the applicant since 2002 there was no sound evidence submitted to the Secretary of State to demonstrate that they now have any

particular emotional or other dependency upon the applicant. The GP's statement that Jessica "also requires family support from her stepmother" is a bald statement unsupported by any explanation. Whilst, of course, Nicholas suffers from ADHD, the DWP letter makes clear that he has ceased to receive DLA and, I was told at the hearing, he has switched to Jobseekers' Allowance. Again, the GP's letter, whilst providing some support for the importance of the applicant on looking after Nicholas and his condition, has to be seen in the light of the fact that there was no evidence to suggest that the children were other than maturing and growing towards "making their own way in the world". Their relationships with the applicant are, I fully accept, close. The circumstances involving the loss of their father in 2009 no doubt contributed to cement their relationships given the evidence from the applicant of her support to them and their father. They have, of course, continued to live with her.

36.
There was, however, in truth no evidence before the Secretary of State which suggested that the impact upon the three adult stepchildren would be other than that which would be expected if a parent and adult child were separated.

37.
Not only was the respondent's decision a rational one, on the evidence submitted to the Secretary of State, her decision was, in my judgment, inevitable. The applicant's circumstances, based upon her relationships with her stepchildren, could not amount to "exceptional" or "compelling" circumstances.

38.
For these reasons, I reject Ms Pinder's submissions on this ground.

39.
Turning now to the issue of the applicant's partner and, it is said, the Secretary of State's failure to properly consider the applicant's relationship with him outside the Rules, Ms Pinder submitted that simply because the applicant did not fall within the "partner" route under Appendix FM based upon a lack of cohabitation, did not absolve the Secretary of State from considering the relationship outside the Rules under Art 8.

40.
Ms Williams submitted that the Secretary of State was not under an obligation to consider the applicant's relationship with her partner outside the Rules as there was, as set out in the pre-action protocol response, "no new evidence" to justify such a consideration. In effect, Ms Williams was placing reliance upon the approach set out in the Court of Appeal's judgment in Singh and Khalid at [64] where Underhill LJ, approving the approach of Sales J (as he then was) in Nagre that:

"there is no need to conduct a full separate examination of Article 8 outside the Rules where, in the circumstances of a particular case, all the issues have been addressed in consideration under the Rules."

41.
The difficulty in applying that approach here is that it must be based on the premise that Appendix FM dealing with the position of "partners" deals with all such cases even when the relationship is not such as to fall within the definition of "partner" in Gen 1.2 because, for example, the individual cannot show that the couple have cohabited for at least two years in a relationship akin to marriage.

42.

There is force in Ms Pinder's submission that, in a case such as the present, Appendix FM does not address "all the issues" in a relationship which is a close one such as the applicant and her current partner but which does not involve cohabitation. The evidence here was that they had chosen not to cohabit in order to 'acclimatise' both the applicant's stepchildren and her new partner's son to the existence and development of their relationship.

43.
It seems to me that Ms Pinder is correct that Appendix FM cannot be said to be a complete consideration of "all the issues" relevant to the relationship between the applicant and her partner. The applicant is, in effect, putting forward circumstances which she claims, despite not complying with the Rules, calls for the grant of leave to her under Art 8. For present purposes I am content to accept Ms Pinder's submission on this issue.

44.
Here, however, again Ms Williams' submission that the applicant would inevitably fail in establishing that there were "exceptional" or "compelling" circumstances based upon her relationship with her current partner is, in my view, irrefutable. That relationship was formed in June 2011 when the applicant had no expectation of remaining in the UK and for the most part, at a time when she was unlawfully in the UK as her leave expired on 1 August 2011. Her relationship was, as a consequence, entitled to "little weight" by virtue of s.117B(4) and (5) of the Nationality, Immigration and Asylum Act 2002 whether viewed as "family" or "private" life. The public interest in effective immigration control was engaged by s.117B(1) of the 2002 Act.

45.
Whether viewed alone or cumulatively, despite the evidence of a close relationship between the applicant and her partner, I see no basis upon which the applicant could succeed under Art 8 based upon that relationship and, even if fuller consideration had been given to it by the Secretary of State, the result would have been inevitable, namely the applicant would have been unsuccessful.

46.
For these reasons, I reject Ms Pinder's submission in this aspect of the claim.

47.
Turning now to the contention that the respondent failed properly to consider the best interests of the child of the applicant's partner, Ms Pinder candidly accepted that this was not her strongest ground. Indeed, she made no oral submissions in relation to it other than to rely on the ground and her skeleton argument.

48.
Ms Williams accepted that s.55 was probably engaged as the applicant's partner's son was part of the 'factual matrix'. However, she submitted that the Secretary of State had fully considered the child's interest in para 6(vi) – (vii) of the pre-action protocol letter response (at page 31 of the bundle).

49.
Ms Williams was undoubtedly correct to, in effect, accept that s.55 of the BCI Act 2009 applied in this case. The respondent was aware of, and had evidence relating to, the son of the applicant's partner. In her decision letter of 8 November 2004, the Secretary of State made no reference to the child's interests. However, in the pre-action protocol letter response the Secretary of State dealt in detail with his circumstances as follows:

“(vi) Decision on Exceptional Circumstances and s.55 It has also been considered whether the particular circumstances set out in our application constitute exceptional circumstances which, consistent with the right to respect for private and family life contained in Article 8 of the European Convention on Human Rights, might warrant a grant of leave to remain in the United Kingdom outside the requirements of the Immigration Rules. In support of your claim you state that your client’s partner has been in regular contact with his child as confirmed in the letter you submitted from the child’s mother.

(vii) This has been considered taking into account our duty under s.55 of the Borders, Citizenship and Immigration Act 2009 to promote and safeguard children’s welfare in the UK. However it is noted that your client has no formal responsibilities for the partner’s child, does not reside with the child in question and is not able to demonstrate that she is taking an active role in this child’s upbringing. The fact that her partner has contact with his child in the UK does not entail that the child’s best interests taken as a primary consideration outweigh the public interest in ensuring effective immigration control, as neither the child nor the partner is obliged to leave the UK by virtue of your client being refused leave to remain. Her partner’s child will remain in the care of his primary carer who can be assumed to act in accordance with his best interests and ensure his welfare. You have also stated that it would be unduly harsh to force all three of Ms Reay’s adult step-children, who have already lost a parent, to have to relocate to Canada for family life to continue. This has been carefully considered however all the children are now over 18 and can no longer be classed as dependant. Your client has claimed it would be unfair to expect the step-children to return to Canada with her, however they are entitled to remain in the UK and their biological mother resides in the UK if they still require support.”

50.
This, in my judgment, amounts to a full consideration of the child’s interests based upon the material and evidence submitted to the Secretary of State. The Secretary of State’s failure to consider those interests in her earlier decision is now rendered academic and there is no basis for setting aside her decision of 8 November 2014 given that she has now discharged her duty under s.55 of the BCI Act 2009.

51.
As I have said, Ms Pinder did not seek to make any oral submissions on this ground. I see no conceivable basis upon which it can be said that the Secretary of State’s consideration of s.55 was irrational or could have led to the applicant’s claim succeeding under Art 8.

52.
For all these reasons, notwithstanding that the respondent’s decision letter was not, in some respects, a model, I reject the applicant’s claim that the decision was unlawful on public law grounds such that it should be quashed.

Decision

53.
Consequently, this claim for judicial review is dismissed.

Signed

A Grubb

Judge of the Upper Tribunal