Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/10793/2014

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 21st August 2014	**On 11th September 2014**
Prepared 21st August 2014	

Before

DEPUTY UPPER TRIBUNAL JUDGE WOODCRAFT

Between

MR MUHAMMAD ISRAR BUTT
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Z. Nasim of Counsel
For the Respondent: Mr E. Tufan, Home Office Presenting Officer

DETERMINATION AND REASONS

The Appellant

1. The Appellant is a citizen of Pakistan born on 17th January 1987. He appealed against two decisions of the Respondent dated 10th February 2014: (i) to refuse his application for leave to remain outside the

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Immigration Rules and (ii) to give directions for this removal under Section 10 of the Immigration and Asylum Act 1999. The Appellant appealed on two grounds. The first was that the Respondent's decision breached the Immigration Rules Section E-LTRPT.2.4 which sets out the relationship requirements the Appellant must meet to qualify for limited leave to remain as a parent. The second ground was that his removal would breach this country's obligations under Article 8 (right to respect for private and family life) of the Human Rights Convention.

2. The Appellant entered the United Kingdom on 15th May 2006 with entry clearance as a spouse extended until 19th January 2013. An application outside the Immigration Rules made on 13th September 2013 was refused on 19th November 2013 with no right of appeal. A further application was made under Article 8 on 31st January 2014. The basis of the Appellant's claim was that he had two British children by his wife from whom he was separated but had access rights to the children and was taking and intended to continue to take an active role in their upbringing.

3. The refusal of the January 2014 application gave rise to the present appeal which came before Judge of the First-tier Tribunal Stott sitting at Birmingham on 30th May 2014. He dismissed the Appellant's appeal under the Rules finding that the Appellant could not meet the requirements of Section E-LTRPT.2.4 but allowed the appeal under Article 8 on the grounds that the Appellant's removal would be a disproportionate interference with the family life which the Appellant had with his children.

4. Both parties appealed that decision, the Respondent appealed first in time arguing that the Judge's analysis of Article 8 was flawed. It did not take into account that the appeal on immigration grounds had failed. The Judge who had made no reference to cases such as **Gulshan [2013] UKUT 00640** should have afforded weight to the fact that the Appellant was seeking to be granted leave outside the Rules. Shortly thereafter the Appellant cross-appealed on the basis that the Judge was wrong to have dismissed the appeal under the Immigration Rules. There was no separate Rule 24 notice by the Appellant in relation to the Respondent's appeal under Article 8.

Immigration Law and Rules Relevant to the Appellant

5. Appendix FM to the Immigration Rules sets out the requirements to be met by a person seeking limited leave to remain as a parent. The burden of proof of showing that the requirements of the paragraph are met rests upon the Appellant and the standard of proof is the usual civil standard of balance of probabilities. Section E-LTRPT.2.4(a) provides that the Appellant must provide evidence that they have either sole parental responsibility for the child or access rights to the child and must provide evidence that they are taking and intend to continue to take an active role in the child's upbringing. The Appellant was not refused under any other provision of the Immigration Rules for example financial requirements.

The Refusal

6. The Respondent was satisfied that the Appellant was no longer in a relationship with the children's mother but did not feel that sufficient evidence had been provided to show that the Appellant had access rights to the children or was taking an active role in their upbringing. He had provided a typed and signed statement from his wife stating that he had regular contact with the children but the Respondent did not consider that that was sufficient evidence of an active role in the children's lives. No further evidence had been provided and the Respondent was not satisfied the Appellant had a genuine and subsisting relationship with the children in the United Kingdom.

7. The Respondent found that the Appellant failed to meet the private life considerations in paragraph 276ADE not least because of the relatively short period of time that he had lived in the United Kingdom. The Appellant had overstayed for a period of fourteen months between the expiry of his entry clearance in 2008 and the application date of his first leave to remain application in the UK on 16th June 2009.

The Proceedings at First Instance

8. Judge Stott noted that there was no formal court order in respect of the contact the Appellant had with his children but the evidence indicated an informal arrangement whereby access was granted provided the Appellant paid some maintenance. The Appellant told the Judge that he was now paying his wife regularly either every week or every two weeks whatever money he could afford. Access would be denied to him should he fail to provide such funding.

9. The Judge commented at paragraph 10 of his determination that there was no guidance on what constituted taking and intending to continue to take an active role in the children's upbringing. Access alone was insufficient. The Judge wrote:

> "I consider that for him to satisfy that particular aspect he needs to provide evidence that he is involved in joint decision making with his estranged wife in respect of medical or educational matters or other issues directly affecting the lives of his children. No such evidence has been produced and because of that lack of evidence I do not find that he has satisfied that particular provision."

10. The Judge dismissed the appeal under the Rules and went on to consider the appeal under Article 8. It was not an option for the children to return to Pakistan with the Appellant. They were British citizens, their mother was the prime carer and they lived with her but saw the Appellant on a regular basis. The best interests of the children who had a strong attachment to their father meant that the relationship could not be continued by other means of communication such as by telephone or

internet. The relationship needed to be of a more personal nature. The Judge concluded at paragraph 15:

> "Although not amounting to playing an active role in their upbringing for the purpose of the Rules I consider that his presence and their ability to continue to be with him on a regular basis is in their best interests and as that is a primary factor to be taken into account I give it due weight."

The Hearing Before Me

11. What the Judge did not do was to weigh in the balance the respective rights of the parties including the best interests of the children against the fact that the Appellant had no leave to remain and according to the Judge could not satisfy the Immigration Rules. As I explained during the hearing, had the matter turned on the Judge's treatment of Article 8 I would have found a material error of law in the determination. The Judge did not take the balancing exercise into account when coming to the decision he did under Article 8. If the determination was set aside the proportionality of the interference in the relationship between the Appellant and his children would need to be reassessed. However if the Appellant was right and he was entitled to succeed under the Immigration Rules the question of Article 8 became irrelevant.

12. In submissions to me Counsel for the Appellant argued that the Judge had made two errors in his assessment of whether the Appellant could come within Section E-LTRPT.2.4. The first was to assume that the Rules required the Appellant to have joint decision making with his estranged wife and the second was to assume that access alone was insufficient. The evidence received by the Judge was that the daughter had stayed overnight with the Appellant. The contact the Appellant was having was more than merely contact at a contact centre. He was providing financial support. This was not a case where the Judge had found that the Appellant was using the children as a vehicle to remain in the United Kingdom. The Judge had erred in law since he had in effect required the Appellant to show that he had joint responsibility. The Appellant had parental responsibility. The evidence that the Appellant had taken the children to school, picked them up, took them to the mosque, the park, shopping and staying overnight was unchallenged and showed that the Appellant was actively involved in his children's upbringing.

13. Guidance issued by the Respondent to Immigration Officers "Family Life as a Parent of a Child in the UK Version 10" stated that the purpose of this route (which replaced the old paragraph 248) was to allow a parent with access rights to continue to live in the United Kingdom. It was not intended to be relied upon by a person who remained in a genuine and subsisting relationship with the other parent, it was to help parental access to children when the parental relationship had broken down. It was aimed at single parents who did not live with the child but had access

rights to that child. The expression “access rights” used in the Immigration Rules simply meant a right to enjoy access, it was not necessary to produce a formal contact order. In any event if the parties had agreed contact between themselves the no order principle under the Children Act 1989 would apply and there would be no contact order as one would not be necessary.

14. For the Respondent it was queried what the expression “access rights” meant. It could not be the case that one was entitled to stay here just because one had fathered a child. This was an application made on form FLR(O) outside the Rules. It was not an application made on the basis of Section E of Appendix FM but the Respondent had nevertheless agreed to consider the application on that basis. The Appellant had been found by the Judge not to be playing an active role. The relationship between the Appellant and his wife appeared to be somewhat confrontational. The Appellant only saw the children when he had some money to give.

Findings

15. I have to decide whether the Judge made a material error of law in relation to either of his two findings. I deal first with his finding that the Appellant could not meet the Immigration Rules. The difficulty with Section E-LTRPT.2.3 is that there is a dearth of authority on what these provisions mean in practice. The Appellant can clearly satisfy sub-paragraph (b) since the children are residing with their mother who is a British citizen and as she and the Appellant are not in a relationship she is not the Appellant’s partner. Next the Appellant must provide evidence that he has access rights to the children and that he is taking and intends to continue to take an active role in the children’s upbringing. The Judge found at paragraph 9 that the Appellant was enjoying access to the two children. The Children Act 1989 enshrines the “no order” principle and given that both parents are content for access to continue as at present it is difficult to see why a court would feel the need to make an order. The absence of an order is thus not a bar to an application under the Section.

16. The issue before the Judge was whether the Appellant had provided evidence that he was taking and intended to continue to take an active role in the children’s upbringing. The Judge recorded the Appellant’s evidence on his involvement with the children and did not find against that. What the Appellant described was taking place such as that he collected the children from school. Was what the Appellant described sufficient to amount to taking an active role in their upbringing and did he evidence an intention to continue to take such a role? For the Appellant Counsel urged me to find that the Appellant could demonstrate this. For the Respondent it was urged upon me that the Judge was right in saying that was not enough.

17. The difficulty in this case is that there is no authority or explanation of what is meant by the phrase “taking and intends to continue to take an active role in the children’s upbringing”. In the absence of that it has to

be given a commonsense meaning. A father who has contact including staying contact which is beneficial to the children and thus is in their best interests (which the Judge found it to be) is in my view playing an active role in the children's upbringing. He is taking them to activities which will help them develop as individuals. The Judge found that the best chance for the children to develop was for their relationship with the Appellant to be of a more personal nature that is direct face to face contact rather than indirect contact. That would also suggest that it should be more than merely seeing the children from time to time. Even if the Appellant is not involved in significant decisions regarding the upbringing of the children he is involved and intends to continue to take an active role in their upbringing. Some weight has to be given to the Appellant's evidence that he was paying maintenance for the children.

18. On the facts as found by the Judge, the Appellant was able to satisfy Section E of Appendix FM although I accept that it would be helpful for some clearer guidance on what is meant by the phrase "taking an active role in the children's upbringing" in the context of immigration control.

19. There were two errors in the Judge's determination. The first was material, the second as it turned out was not. The material error was to find that the Appellant could not satisfy the Immigration Rules when I find that he could on the basis of the evidence received by the Judge. The second error which turns out not to be material is the Judge's finding that if the Appellant could not meet the Rules the appeal should be allowed under Article 8 given there was no consideration of the weight to be attached to the fact that the Appellant had no leave to remain in this country and (as the Judge had found) did not succeed under the Immigration Rules. As the Appellant did succeed under the Rules I do not need to assess the proportionality of interference since there will be none. I set aside the Judge's determination and remake the decision by allowing the Appellant's appeal under the Immigration Rules.

Decision

The decision of the First-tier Tribunal involved the making of an error of law and I have set it aside. I have remade the decision by allowing the Appellant's appeal under the Immigration Rules.

I make no anonymity order as there is no public policy reason for so doing.

I do not disturb the decision of the Judge not to make a fee award in this case.

Signed this 10th day of September 2014

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Deputy Upper Tribunal Judge Woodcraft