Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/19882/2013**

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 9 October 2014	**On 10 October 2014**

Before

Deputy Upper Tribunal Judge MANUELL

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

Mr SIMON JOHN CABOT
(NO ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Mr N Bramble, Home Office Presenting Officer
For the Respondent: Mr T Samuel, Counsel
(instructed by ICS Legal)

DETERMINATION AND REASONS

Introduction

1. The Appellant (the Secretary of State) appealed with permission granted by First-tier Tribunal Judge Heynes on

14 August 2014 against the determination of First-tier Tribunal Judge Scott-Baker who had dismissed the Appellant's appeal under the Immigration Rules but who had allowed it under Article 8 ECHR in a determination promulgated on 17 June 2014.

2. The Respondent is a national of the Commonwealth of Australia, born on 23 April 1976. He had sought further leave to remain in the United Kingdom to exercise rights of access to his child Miss Zahara Giselle Cabot. The judge had found that the Respondent had been living in the United Kingdom lawfully for in excess of 10 years. The Respondent and his wife had separated and had agreed access to the child without formal proceedings. The judge found that the Respondent could not satisfy the Immigration Rules relevant to his application, but went on to find that there was family life between father and daughter and that the child's best interest were for her father to remain in the United Kingdom. The Respondent had also developed a strong private life in the United Kingdom. The proportionality balance was in his favour. The case was analogous to MS (Ivory Coast) [2007] EWCA Civ 1, which case had predated the commencement of section 55 of the Borders, Citizenship and Immigration Act 2009. The judge found that the Respondent should be granted a short period of time to establish formal access rights to his child after which he could make a further application to the Secretary of State.

3. Permission to appeal was granted because it was considered that it was arguable that the judge had not reached a proper finding of exceptional or compelling circumstances despite quoting Gulshan (Article 8 – new rules – correct approach) [2013] UKUT 00640 (IAC). It was also arguable that the judge had not given sufficient reasons for her conclusions.

4. Standard directions were made by the tribunal, indicating that the appeal would be reheard immediately if a material error of law were found.

Submissions – error of law

5. Mr Bramble for the Appellant relied on the grounds of onwards of appeal and the grant of permission to appeal. Candidly and to his credit he accepted that it while it was possible to show that there had been at least one error of

law, it was more difficult to show that it had been material to the outcome. Nevertheless it was arguable that the judge's application of the current authorities in relation to Article 8 ECHR had been inadequate and there had been insufficient findings of fact to justify her conclusions.

6. It was convenient for the tribunal to engage in dialogue with the advocates. Mr Bramble accepted that the Respondent had now applied to the family court for access to his child. A copy of the FHDRA appointment on 29 October 2014 at the Family Court had been produced. That foreshadowed the further application which Judge Scott-Baker had indicated would be needed.

7. Mr Samuel for the Respondent submitted that this was the right way forward. Any error of law was not material and the sensible course was to allow the Respondent to make that fresh application, once his Article 8 ECHR leave had been granted.

8. The tribunal indicated that it found no material error of law and reserved its determination which now follows.

No material error of law finding

9. Cases involving children and access to children are among the most difficult which the First-tier Tribunal encounters. Sometimes children are used to bolster weak cases, but that was very obviously far from the case in the present appeal. The state of the authorities when Judge Scott-Baker heard this appeal was perhaps somewhat confused. The authorities have since been resolved, at least for the time being, by MM (Lebanon) [2014**]** EWCA Civ 985, which was released after the judge's determination had been promulgated. In the tribunal's view the judge's approach, which was ultimately a Razgar [2004] UKHL 27 analysis, reflected the compelling merit of the appeal and may be thought to have prefigured MM (Lebanon) [2014**]** EWCA Civ 985 which disapproves of the intermediate requirement for exceptional circumstances before moving to consider Article 8 ECHR. It is also perhaps significant that section 177B of the Nationality, Immigration and Asylum Act 2002, in force from 28 July 2014, favours the Respondent's situation in the proportionality analysis.

10. The judge correctly identified that the appeal failed under the Immigration Rules and that there was no specific provision as at the date of the hearing which covered the Respondent's situation. He needed to take further formal steps (which it was accepted he has now done), which will enable him to make an application within Appendix FM which has every prospect of success. It could not possibly have been in the Respondent's child's best interests for her father to have been forced to return to Australia and attempt to pursue access to her in the formal court sanctioned sense from there, since personal contact would have been broken and the father would have been forced to incur great expense, needlessly.

11. That situation may reasonably be thought to be an example of exceptional circumstances too obvious for the judge to have needed to have spelt it out in specific terms. The potential disruption to a long and lawfully established private life, including established and well remunerated employment, from which financial provision was being made for the separated spouse as well as the child, was a further such factor.

12. In the present appeal it seems to the tribunal that there is no useful purpose in examining in any detail the clear and careful determination of a very experienced judge, when the Secretary of State accepts that any technical error in the judges' reasoning cannot be said with any confidence to be material. This applies with particular force here, where as noted above, the law has already moved on.

13. The tribunal accordingly finds that there was no material error of law in the determination and there is no basis for interfering with the judge's decision.

14. By way of a footnote, the tribunal records that in consequence the Secretary of State is bound to grant the Respondent a period of leave to remain under Article 8 ECHR and that the Respondent is in the light of the First-tier Tribunal's determination obliged to make a fresh application under the Immigration Rules (he may have several options available) during the currency of his Article 8 ECHR leave.

DECISION

The making of the previous decision did not involve the making of a material error on a point of law and stands unchanged

Signed **Dated**

Deputy Upper Tribunal Judge Manuell