Upper Tribunal
(Immigration and Asylum Chamber)
IA/30267/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On August 27, 2014	**On September 1, 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE ALIS

Between

MR WINSTON CONROY SHAW
(NO ANONYMITY DIRECTION)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Balroop, Counsel, instructed by Greenland Lawyers
For the Respondent: Mr Duffy (Home Office Presenting Officer)

DETERMINATION AND REASONS

1. The appellant, born January 24, 1977, is a citizen of Jamaica. On April 16, 2002 the appellant entered the United Kingdom as a visitor and has lived here ever since. On May 9, 2012 he was granted further leave to remain/enter until November 9, 2012 and on November

6, 2012 he submitted his current application for leave to remain under article 8. The respondent refused his application on July 2, 2013 on the basis he did not meet the Immigration Rules and she found no exceptional circumstances to allow the appeal outside of the Immigration Rules.

2. The appellant appealed to the First-tier Tribunal Section 82(1) of the Nationality, Immigration and Asylum Act 2002 (hereinafter referred to as the "2002 Act") on July 17, 2013 and on May 1, 2014 Judge of the First Tier Tribunal Boyd (hereinafter referred to as the "FtTJ") heard his appeal and dismissed it in a determination promulgated on May 14, 2014.

3. The appellant lodged grounds of appeal on May 22, 2014 and on June 16, 2014 Judge of the First-tier Tribunal White granted permission to appeal finding it arguable the FtTJ had erred in his approach.

4. The appellant, his son and the child's mother along with the appellant's current partner were all in attendance at the hearing before me but none were required to give evidence.

PRELIMINARY ISSUES

5. I raised with the representatives whether this appellant could have succeeded under the Immigration Rules and in particular whether he met all of the requirements of Section E-LTRPT or was entitled to the benefit of EX.1 of Appendix FM.

6. Both representatives agreed that the appellant could not satisfy the requirements of Section E-LTRPT 2.3 and 3.1. Consequently whilst the FtTJ may have been wrong in paragraph [15] of his determination it was not material because he could not meet the relevant Rule. Additionally, the appellant could not satisfy EX.1 of Appendix FM because firstly his last grant of leave had been to enter the United Kingdom (he had originally been given port entry in 2002) and secondly, his leave was for only six months. EX.1 was not a standalone application and it did not attach to any of the Rules that the appellant sought to apply under.

7. Both parties agreed that the only issue was whether the FtTJ's assessment of article 8 contained an error in law.

SUBMISSIONS

8. Mr Balroop submitted:-

   a. In light of the length of time he had been here and his contact arrangements with his son, article 8 was engaged. The FtTJ had accepted there was a good arguable case and the issue was one of proportionality.

   b. The child's mother in both her written statement and oral evidence confirmed that the appellant saw his son on a daily basis and shared responsibilities for looking after him.

   c. In considering proportionality the FtTJ, in paragraph [21], rejected the child's mother's evidence without any foundation and this finding then formed part of his findings in paragraph [23]. The FtTJ overlooked the fact the appellant had leave to stay in the country based on his contact with his son and whilst he had been an overstayer he was not an overstayer when he made this application.

   d. The FtTJ failed to attach sufficient weight to the best interests of the child.

   e. The FtTJ erred.

9. Mr Duffy submitted:

   a. The FtTJ made findings that were clearly open to him.

   b. The FtTJ found the appellant did not meet the Immigration Rules either as a parent, under either Appendix FM or paragraph 276ADE. Whilst the test out in Gulshan [2013] UKUT 000640 had been modified in MM (Lebanon) & Ors, R (on the application of) v Secretary of State for the Home Department & Anor [2014] EWCA Civ 985 there was nothing further to consider outside of the Rules and therefore there was no error in law. The Rules were a complete code in this appeal and there was no point in the Rules if they were not applied.

c. There was no material error.

10. In the event there was an error then both parties agreed the case could be dealt with on the evidence currently before me save that I would have to have regard to the Immigration Act 2014 and section 19 that introduced Section 117B into the 2002 Act.

11. I reserved my decision.

FINDINGS

12. The appellant came to the United Kingdom as a visitor for six months in May 2002 and he should have left in November 2002. He did not and between November 2002 and May 2012 he attempted to establish both a family and private life in the United Kingdom.

13. There was no dispute that his son was both conceived and born at a time when he was here illegally. The FtTJ commented in paragraph [21] that he was satisfied the appellant supported himself by living and working here illegally and rejected his claim that he had been supported by relatives. He also rejected his claim that he had attempted to regularise his stay between November 2002 and 2011. The appellant is no longer with the child's mother and has been with his current partner for two years.

14. The appellant did not meet the Immigration Rules and Mr Duffy has submitted that although the test in Gulshan has been modified slightly the position remains the same as the Immigration Rules are a complete code.

15. Mr Duffy's argument is that the Rules are a complete code although Mr Balroop challenges this. The FtTJ assessed the issue of whether private or family life was engaged based on the appellant's claim he had contact and in paragraph [20] the FtTJ indicated he would consider the case on the basis that article 8 was engaged.

16. I am satisfied the FtTJ was entitled to approach the issue of article 8 in the way he did and his general approach does not display any error.

17. The real issue is whether this is an appeal where the FtTJ wrongly considered proportionality and reached a finding that was not open to him.

18. Mr Balroop's main submission is that the FtTJ erred in his assessment of the level of contact that existed between the appellant and his son. The grounds of appeal do not assist me because they concentrated on issues that no longer concern me.

19. I was invited to consider the child's mother's written and oral evidence. Mr Balroop submitted to me that she adopted her statement and she had not been challenged on her evidence. Her written statement is contained at page 4 of the appellant's bundle and she stated-

> "Winston is still playing a father role in his son's life as a good and caring dad as always from the beginning. He still takes Conroy to and from school sometimes as well as taking him to his home where they both spend the weekend together…."

20. The FtTJ recorded her evidence in his determination at paragraphs [11] to [12]. She did not, as Mr Balroop submitted, state that the appellant saw his son daily. This was evidence given by the appellant but the FtTJ rejected this evidence as he was entitled to do so. He accepted that the appellant was involved in his son's life but he rejected his claim that this was on a daily basis. The FtTJ's finding in paragraph [21] was therefore one that was open to him. Similarly, his findings regarding the school letter were an interpretation that was open to him.

21. Between paragraphs [23] and [25] the FtTJ assessed all the evidence. He took into account not only the interests of the child but he also took into account that the child's mother had only been granted leave to remain because of her son's status. Their son had been granted leave to remain under the British Nationality Act on the basis he had been born here and had lived here for ten years. He automatically became entitled to British citizenship.

22. The FtTJ did not ignore the best interests of the child. He had regard to them and ultimately concluded that on balance removal was not disproportionate. He had regard to the evidence presented to him and the law as it stood at the date of hearing. Ironically, the new Section 117B(vi) of the 2002 Act may assist the appellant but in considering whether there has been an

error in law I cannot have regard to this piece of legislation.

23. I am satisfied the FtTJ's assessment of the evidence does not show an error in law and the findings were findings that were open to him.

DECISION

24. There is no material error of law and I uphold the original decision.

25. Under Rule 14(1) The Tribunal Procedure (Upper Tribunal) Rules 2008 (as amended) the appellant can be granted anonymity throughout these proceedings, unless and until a tribunal or court directs otherwise. No order has been made and no request for an order was submitted to me.

Signed: Dated:

Deputy Upper Tribunal Judge Alis

TO THE RESPONDENT

I do not make a fee award as the appeal failed.

Signed: Dated:

Deputy Upper Tribunal Judge Alis