Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/33236/2013

THE IMMIGRATION ACTS

Heard at Newport
On 15 May 2014

Determination Promulgated

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Before

UPPER TRIBUNAL JUDGE GRUBB

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

BM
(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Mr I Richards, Home Office Presenting Officer
For the Respondent: The Appellant in person

DETERMINATION AND REASONS

1. This appeal is subject to an anonymity order made by the First-tier Tribunal pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 (SI 2005/230). Neither party invited me to rescind the order and I continue it pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698).

2. This is an appeal by the Secretary of State against a decision of the First-tier Tribunal (Judge N J Osborne) which allowed the appellant's appeal against the Secretary of State's decision taken on 22 July 2013 refusing to grant "BM" further leave to remain outside the Immigration Rules under Article 8 of the ECHR.

3. For convenience I will hereafter refer to the parties as they appeared before the First-tier Tribunal.

Background

4. The appellant is a citizen of Zimbabwe who was born on 9 February 1983. On 15 May 2009, the appellant was granted discretionary leave to remain under Article 8 on the basis of his family life with his (then) partner "JLB" and his son "JLM". His relationship with JLB broke down and is no longer subsisting. The appellant has a new relationship with "NS" and they have a daughter "A" who was born on 11 December 2010 and so is aged 3. The Judge found (para 10(iv)) that the appellant's relationship with NS had lasted for a period of at least approaching 4 years.

5. On 30 April 2012, the appellant made an application for an extension of his leave to remain now on the basis of his relationship with NS and A in the light of the fact that his earlier relationship with JLB no longer subsisted.

6. In her decision dated 18 July 2013, the Secretary of State considered that the appellant's previous grant of discretionary leave had been on the basis of grounds which no longer persisted and so she considered his application under Appendix FM.

7. As regards, the appellant's relationship with NS, the Secretary of State noted that the appellant's previous relationship with JLB had not broken down until February 2013 and so the appellant could not establish that NS was his "partner" as they had not been living together in a relationship akin to marriage for at least 2 years prior to the application (see Gen 1.2). Further, as regards reliance upon the appellant's relationship with his daughter A, the Secretary of State concluded that the appellant did not have "sole responsibility" for A and therefore could not meet the requirements of E-LTRPT 2.3. As regards reliance upon his relationship with his son JLM, the Secretary of State concluded again that the appellant did not have sole responsibility for JLM and did not have "access rights" so that he failed to meet the requirements of para E-LTRPT 2.4. Consequently, the Secretary of state concluded that the appellant could not succeed under Appendix FM.

8. The Secretary of State also considered the appellant's application under the private life rule in para 276ADE but concluded that the appellant had not lived in the UK for 20 years and since he had resided in Zimbabwe for the majority of his life, it had not been established that he had no ties (including social, cultural or family) with Zimbabwe (para 276ADE(iii) and (vi)).

The Appeal

9. The appellant appealed to the First-tier Tribunal. In a determination promulgated on 13 February 2013, Judge N J Osborne allowed the appellant's appeal under Article 8 of the ECHR. Judge Osborne accepted that the appellant had a "well established family life" with his (now) partner, NS and their daughter A and also with JLM, his son from his previous relationship. Judge Osborne concluded that it was in those children's best interests to continue their relationships with the appellant in the UK. Taking into account that the appellant had always lawfully been in the UK, Judge Osborne found that the public interest was outweighed by the impact upon the family life that the appellant enjoyed with his partner and children if removed to Zimbabwe as their relationship would effectively be "terminated".

10. The Secretary of State sought permission to appeal to the Upper Tribunal on the basis that the Judge had erred in law in allowing the appeal under Article 8 by failing to consider whether there were "exceptional" or "compelling" circumstances which justified the grant of leave under Article 8 outside the Immigration Rules given that the appellant could not meet the requirements of the Rules.

11. On 4 March 2014, the First-tier Tribunal (Judge Hemingway) granted the Secretary of State permission to appeal to the Upper Tribunal on that ground. Thus, the appeal came before me.

Submissions

12. The appellant was not represented before me and appeared in person. The Secretary of State was represented by Mr Richards. He relied upon the grounds and submitted that the Judge had erred in law in failing to identify "compelling" circumstances to justify allowing the appeal under Article 8 following Gulshan (Article 8 – New Rules – Correct Approach) [2013] UKUT 00640 (IAC). Mr Richards submitted that the Judge had found that the appellant had no entitlement under the Rules and he had failed to take that into account, emphasising instead the positive factors in the appellant's favour in finding that the appellant's removal would be disproportionate.

13. Mr Richards invited me, if I found an error of law, to remake the decision by determining whether there were compelling circumstances that, in carrying out the balancing exercise, outweighed the public interest. Mr Richards accepted that the appellant now met the requirements of Appendix FM. That is because on 28 April 2014 at the Family Court in Bristol the appellant was granted contact with his son JLM on a weekly basis each Sunday. The Court document was provided by the appellant at the hearing. The appellant met the requirements in E-LTRPT 2.4 (a)(ii) based upon his relationship with his son. Applying E-LTRPT 1.1(d), the appellant met all the requirements of LTRPT 2.2-2.4 and LTRPT 3.1 and paragraph EX.1 applied. EX.1 applied because the appellant had a genuine and subsisting parental relationship with his son who is under the age of 18, in the UK and a British citizen and, given that he was living with his mother JLB also a British citizen, it would not

be reasonable to expect JLM to leave the UK. Mr Richards invited me to take that into account as a relevant factor in carrying out the balancing exercise.

14. The Appellant repeated his personal circumstances and relied upon an IDI which stated that an individual's application would be considered on the basis upon which previous discretionary leave was granted unless there had been a change of circumstances. The appellant, nevertheless, appeared to accept that the circumstances of his application had now changed as it was based upon his relationship with his current partner and two children rather than his relationship with his previous partner and their child (JLM) which had been the basis of his previous grant of discretionary leave. The appellant also told me about his ex-partner demanding money from him in order to allow him to see his son JLM and that there had therefore been difficulties with contact. As I have already indicated, he produced a contact order dated 28 April 2014 from the Family Court, Bristol granting him contact with his son JLM on a weekly basis each Sunday.

Error of Law

15. It was accepted before Judge Osborne that the appellant could not meet the requirements of Appendix FM or, indeed, para 276ADE. Judge Osborne also rejected the submission made by the appellant's (then) legal representatives that the appeal should be considered under the old rules as the appellant's application had been made before the new "Article 8" rules had come into effect on 9 July 2012. If, of course, the new rules were not relevant then Judge Osborne cannot be criticised for failing to approach his Article 8 assessment on the basis set out in the recent case law summarised in Gulshan where the new rules do apply.

16. This is a matter of some complexity and difficulty. Mr Richards did not seek to address me on this issue apart from submitting (in my view correctly) that the IDI relied upon by the appellant (and his representative before Judge Osborne) did not require that the old rules be applied because the appellant's current claim was based upon a change of circumstances since the previous grant of his discretionary leave. That was because the previous grant was based upon his relationship (now terminated) with JLB whilst his present application was based on his relationship with his new partner NS and their daughter A and, of course, his continuing relationship with JLM.

17. There are, on the face of it, two conflicting decisions of the Court of Appeal dealing with the applicability of the new Art 8 rules where an individual's application was made before 9 July 2012 (when those rules came into force) but the decision was made on or after that date.

18. In Edgehill and Bhoyroo v SSHD [2014] EWCA Civ 402 (decided 2 April 2014), the Court of Appeal (Laws, Jackson and Black LJJ) interpreted the 'implementation provisions' in HC 194 as meaning that an application made before 9 July 2012 could not be decided on or after that date under the new rule (there the private life rule in para 276ADE) but had to be determined on the basis of the previous rules and it was

those rules which were relevant to any Article 8 assessment. At [32], Jackson LJ stated:

> "The Immigration Rules need to be understood not only by specialist immigration counsel, but also by ordinary people who read the rules and try to abide by them. I do not think that [counsel for the Secretary of State's] interpretation of the transitional provisions accords with the interpretation which any ordinary reader would place upon them. To adopt the language of Lord Brown in *Mahad*, "the natural and ordinary meaning of the words, recognising that they are statements of the Secretary of State's administrative policy," is that the Secretary of State will not place reliance on the new rules when dealing with applications made before 9th July 2012."

19. In Haleemudeen v SSHD [2014] EWCA Civ 558 (decided 2 May 2014) (Sullivan, Beatson and Sharp LJJ), the Court of Appeal reached a diametrically opposed view. The Court of Appeal applied Odelola v SSHD [2009] UKHL 25 that the relevant rules were those in force at the date of decision. The Court held that a FtT Judge had erred in law in his approach to Article 8 when determining an appeal where the application for leave had been made prior to 9 July 2012 but was decided after that date, because he had done so without regard to the 'new Article 8' private and family life rules in Appendix FM and para 276ADE. At [40]-[41] Beatson LJ said this:

> "40. I, however, consider that the FTT Judge did err in his approach to Article 8. This is because he did not consider Mr. Haleemudeen 's case for remaining in the United Kingdom on the basis of his private and family life against the Secretary of State's policy as contained in Appendix FM and Rule 276ADE of the Immigration Rules. These new provisions in the Immigration Rules are a central part of the legislative and policy context in which the interests of immigration control are balanced against the interests and rights of people who have come to this country and wish to settle in it. Overall the Secretary of State's policy as to when an interference with an Article 8 right will be regarded as disproportionate is more particularised in the new Rules than it had previously been. The new Rules require stronger bonds with the United Kingdom before leave will be given under them. The features of the policy contained in the Rules include the requirements of twenty year residence, that the applicant's partner be a British citizen in the United Kingdom, settled here, or here with leave as a refugee or humanitarian protection, and that where the basis of the application rests on the applicant's children that they have been residents for seven years.
>
> 41. The FTT's decision on Mr Haleemudeen 's Article 8 appeal is contained in [34]-[41], which I summarised and set out in part at [21] – [23] above. Those paragraphs do not refer, either expressly or implicitly, to paragraph 276ADE of the rules or to Appendix FM. None of the new more particularised features of the policy are identified or even referred to in general terms. The only reference to the provisions is in the FTT's summary (at [30]) of Mr. Richardson's submission that the reference to the new Rules in the refusal letter was of little relevance because at the time of Mr. Haleemudeen 's application those Rules had not been promulgated and thus did not apply to his case. That submission could not succeed in view of the decision of the House of Lords in *Odelola's* case, to which I refer at [25] above."

20. The Court of Appeal hearing in Haleemudeen was on 15 April 2014 and the decision in Edgehill was handed down on 2 April 2014. However, Edgehill does not appear to have been cited to the Court of Appeal in Haleemudeen and no reference to it is made in the Court's judgment. Equally, it does not appear that any argument was put to the Court in Haleemudeen based upon the transitional provisions in HC 194

and also found in paras A277-A280 of the Immigration Rules. Paragraph A280(c), in particular, appears to require the application of the 'old' rather than any 'new' rules in Part 8 of the Immigration Rules (dealing with family life cases) where an application is made before 9 July 2012 but a decision is only made on or after that date. The 'date of decision' approach in Odelola is subject to any transitional provisions (see Odelola *per* Lord Brown at [34]). (But contrast para A277C which allows the Secretary of State to chose to apply certain of the 'new' rules provisions in Appendix FM and para 276ADE in just that situation but only where the individual cannot succeed under the 'old' rules but can under the 'new' rules.)

21. The position is, therefore, that there are two inconsistent decisions of the Court of Appeal both of which are binding upon the Upper Tribunal. It is not easy, if indeed it is possible, to see how the decisions can be reconciled unless a different approach applies to para 276ADE than does to Appendix FM. Edgehill was only concerned with the former. However, whilst the Court in Haleemudeen was primarily concerned with the application of Appendix FM, it also raised the application of para 276ADE (see [40]). There is the added difficulty that the relevance of paras A277-A280 to the issue decided by each constitution of the Court of Appeal has not been explored in either decision: those provisions were particularly relevant to the application of Appendix FM in Haleemudeen.

22. The Court in Haleemudeen makes no reference to, as it does not appear to have been cited to it, the binding authority of Edgehill. The *per incuriam* doctrine has no application where a lower court is faced with a decision of a higher court binding upon it (see Cassell & Co Ltd v Broome [1972] AC 1027; [1972] 1 All ER 801 – decision of House of Lords binding on Court of Appeal even if that decision was reached *per incuriam*). That is equally applicable to decisions of the Court of Appeal binding on the High Court (*per* Lords Hailsham and Diplock in Cassell & Co Ltd v Broome at p.809h and p.874h respectively) and, of course, which are binding on the Upper Tribunal. The relevance of the doctrine lies rather in whether the Court of Appeal itself could refuse to follow its own previous decision on the basis that it was decided without reference either to another binding decision of that court or above it in the judicial hierarchy or without reference to material statutory or other legislative provisions. The doctrine, therefore, has no application in this appeal so as to allow me to choose between Court of Appeal authorities on the basis of any argument that that Haleemudeen may have been decided *per incuriam*.

23. I am conscious that I have not heard argument on this issue. My view, albeit expressed somewhat cautiously in the absence of argument, is that I am constrained to follow the more recent decision of the Court of Appeal on the issue of the application of the new rules. I am not free to choose between them as the Court of Appeal itself could do in the future (see Patel and others v SSHD [2012] EWCA Civ 741 at [59]). I should assume that the more recent decision states the applicable law. Left to decide the issue for myself, I would not necessarily have reached the same conclusion because of the terms of para A280(c) which appears to preserve the application of the old rules under Part 8 for pre-9 July 2012 applications. However, I do not propose to analyse the point further because, for the reasons I will give

shortly, this point does not ultimately affect the outcome appellant's appeal which I have concluded should be allowed under Article 8.

24. Consequently, I am content to accept, on the basis of Haleemudeen, Mr Richards' submission that the new rules did apply. It was not necessary for Judge Osborne to use the terms "exceptional" or "compelling" to describe the appellant's circumstances provided that was the substance of his decision (see Haleemudeen at [47] *per* Beatson LJ). However, Judge Osborne, despite his positive and favourable findings, did not *in fact* consider whether the appellant's circumstances were "exceptional" or "compelling" such as to justify the grant of leave outside the Rules because there would be unjustifiably harsh consequences (see MF (Nigeria) v SSHD [2013] EWCA Civ 1192; R (Nagre) v SSHD [2013] EWHC 720 (Admin) and Gulshan). At least, I cannot be confident that was the substance of his decision. That amounted, therefore, to an error of law.

25. For those reasons, the First-tier Tribunal erred in law in allowing the appeal under Article 8 and I set aside the decision which I now turn to re-make.

Remaking the Decision

26. In his determination, Judge Osborne very carefully considered the evidence and made a number of findings. It was not suggested by Mr Richards that any of those findings were unsustainable on the evidence before the Judge. I, therefore, take and adopt those findings as my own. At para 10(iv) the Judge dealt with the relationship between the appellant and his (now) partner NS and their daughter A.

> "The Respondent accepts (as is set out in the Reasons for Refusal Letter) that the Appellant is now in a relationship with NS and that the Appellant and NS have a daughter, A. That family relationship is continuing. The Appellant, NS, and A all live together as a family at []. Indeed, the Appellant and NS have been in a relationship before the breakdown of the Appellant's relationship with JLB. I therefore find that the Appellant and NS have been in a relationship for a period of at least approaching four years as A was born on 11 December 2010 and patently would have been conceived nine months before that date."

27. At para 10(v), the Judge found that the appellant had a "close relationship" with his daughter, A. He set out the circumstances of their life as follows:

> "…The Appellant and NS want nothing but the best for A. They take her together to nursery on Mondays because that is one of the Appellant's rest days from work. The Appellant also spends time with A on his own when NS has time alone to relax or catch up with her friends. NS's parents have emigrated to Canada and so there is no possibility of grandparental babysitting which is carried out entirely by the Appellant."

28. At paras 10(vi)-(vii) the Judge dealt further with the nature of the relationships as follows:

> "(vi) NS has written a letter which is exhibited to the Appellant's bundle. She states how she relies upon the Appellant to look after their home and their daughter A. She relies upon him financially. He has a great bond and

relationship with A and is a brilliant father. She states that if the Appellant were to be removed from the United Kingdom it would affect her greatly as she sees her future with him. She cannot imagine what life would be like for A to have her father taken away from her.

(vii) NS states that she would not be able to relocate to Zimbabwe because she does not know the language or the way of life there. Also, due to the way that Zimbabwe is portrayed in television programmes, she is concerned about the safety there for herself and her daughter. She states that she wishes her daughter to benefit from her British citizenship and wishes that she should reside in the UK. Finally she states that she has a sister and stepfamily in the United Kingdom upon whom she relies for support and that those relationships would not be able to be maintained and enjoyed if she was expected to accompany the Appellant to Zimbabwe."

29. Then at paragraphs 10(viii)-(ix) the Judge continued:

(viii) I find that NS is a UK citizen. I find that A born 11 December 2010 is also a UK citizen. Following well-established case law (**Sanade and Others (British children – Zambrano – Dereci) [2012] UKUT 00048 (IAC)**) it would be unreasonable to expect NA and A to leave the United Kingdom.

(ix) I have no difficulty in accepting the Appellant's evidence that he is in a well-established committed relationship with NS and that his daughter A is all the world to him. He further confirmed that NS knows about his previous relationship with JLB and the fact that he has a son, JLM. In fact, he explained that NS has met JLM and that they have spent some time together. She supports his application for contact with JLM. I find that those are encouraging signs for the Appellant's future family life not only with NS but also with A and JLM."

30. At paragraphs 10(x)-(xi) the Judge dealt with the appellant's relationship with his son JLB as follows:

(x) The Appellant has established through documentary evidence that he is presently paying periodical payments (maintenance) for JLM through the Child Support Agency. He stated that JLB is prone to stopping his contact with JLM when she considers that he should be paying more by way of maintenance than he has been asked to pay through the Child Support Agency. The Appellant states that he does what he can. He works, maintains a family in Newport, and fulfils his financial obligations through the Child Support Agency to JLM. He considers that JLM would benefit from a continuing relationship with him as they have always had a strong bond and enjoy each other's company. The Appellant submitted a bundle of photographs depicting the Appellant and JLM enjoying each other's company in various locations and on various occasions. The photographs were patently taken over a period of time as JLM appears in those photographs in various stages of his development. The photographs do not appear to be staged or planned but appear to be relatively typical family photographs taken whilst father and son were enjoying each other's company. Having seen those photographs and having heard the evidence of the Appellant, I am satisfied to that standard which has to be applied in these appeals that he has had and may be capable of having in the reasonably foreseeable future a relatively full and happy relationship with his son JLM.

> (xi) Moreover, the Appellant explained that although he has been allowed contact with JLM, that contact has been often disrupted and to some extent prevented over a period of time by JLB. The Appellant submitted in evidence a receipt which he has been given by Bristol County Court confirming that the Appellant has commenced contact proceedings as recently as 10 February 2014 in order to formalise his contact arrangements with JLM in JLM's best interests."

31. At the hearing, as I have already indicated, the evidence was that the appellant has obtained a contact order on 28 April 2014 for weekly contact on a Sunday with JLM. I accept that evidence.

32. At paras 18-19 of his determination Judge Osborne concluded that it was in the best interests of both A and JLM to have continued contact with the appellant in the UK rather than at a distance by means of modern communications such as email and Skype. He relied upon what was said in Azimi-Moayed and Others [2013] UKUT 00197 (IAC). I agree with that finding. The best interests of both A and JLM are a primary consideration (see ZH (Tanzania) v SSHD [2011] UKSC 4). A child's best interests whilst, a primary consideration, may however be outweighed by competing factors (see ZN at [26] *per* Baroness Hale) but no other factor can be treated as inherently more significant (see Zoumbas v SSHD [2013] UKSC 74 at [10] *per* Lord Hodge).

33. The Judge made a number of positive findings concerning the relationships between the appellant, his current partner and their daughter and his relationship with his son. Judge Osborne accepted that the appellant's commencement of contract proceedings were genuine (see para 10(xiii)) and I see no reason to depart from that finding. Those contact proceedings have now been successful.

34. Judge Osborne also found that it would not be reasonable to expect either of the appellant's children or his current partner NS to leave the UK as they are British citizens. All have, so far as I am aware, always lived in the UK. I agree that it would not be reasonable to expect the appellant's current partner and his daughter A to leave the UK to live with him in Zimbabwe. His son, of course, lives with his mother who is entitled to remain in the UK and there can be no question of him living in Zimbabwe with the appellant. The consequence, therefore, of the Secretary of State's refusal of leave to the appellant is that, as Judge Osborne put it in para 19 of his determination, that the relationships between the appellant and JLM and A would effectively be terminated by his removal. That would, in my judgment, be equally true of the relationship with his current partner NS. Although it maybe somewhat easier to maintain contact with an adult by such methods as email and Skype, that contact would be wholly inadequate to maintain a spousal relationship when there would be no prospect of returning to the UK.

35. I apply the five stage test set out by Lord Bingham of Cornhill in Razgar [2004] UKHL 24 at [17]. I accept that there is family life between the appellant and his current partner NS and his two children JLM and A. The appellant's removal would

seriously interfere with the continuation of that family life and, consequently, I am satisfied that Article 8.1 is engaged.

36. Turning to Article 8.2, I accept that the decision is in accordance with the law and that it is for a legitimate aim, namely the economic well-being of the country. The crucial issue is whether the interference with the family life of the appellant and his family members is proportionate. In Razgar, Lord Bingham at [20] identified that that issue:

> "always involve[s] the striking of a fair balance between the rights of the individual and the interests of the community which is inherent in the whole of the Convention. The severity and consequences of the interference will call for a careful assessment at this stage."

37. In addition, in a case where an individual cannot satisfy the requirements of the new Article 8 Immigration Rules, the case law requires there to be "exceptional" or "compelling" circumstances such that there are unjustifiably harsh consequences to the individual and his other family members.

38. Even assuming that the appellant cannot meet the requirements of those Immigration Rules, I am satisfied that the strength and nature of the relationships taken with the irreparable consequences to those relationships if the appellant is removed do outweigh the public interest.

39. However, in this case Mr Richards accepts that the appellant does now meet the requirements of the Immigration Rules in Section R-LTRPT of Appendix FM. That is because he has now obtained through a court order "access rights" within E-LTRPT 2.4(a)(ii).

40. The relevant provisions in Section R-LTRPT of Appendix FM are as follows:

> **"Section R-LTRPT: Requirements for limited leave to remain as a parent**
> R-LTRPT.1.1. The requirements to be met for limited or indefinite leave to remain as a parent or partner are-
> (a) the applicant and the child must be in the UK;
> (b) the applicant must have made a valid application for limited or indefinite leave to remain as a parent or partner; and
> ….
> (d) (i) the applicant must not fall for refusal under S-LTR: Suitability leave to remain; and
> (ii) the applicant meets the requirements of paragraphs E-LTRPT.2.2-2.4. and E-LTRPT.3.1.; and
> (iii) paragraph EX.1. applies.
>
> ….
>
> **Relationship requirements**
> E-LTRPT.2.2. The child of the applicant must be-
> (a) under the age of 18 years at the date of application, …;
> (b) living in the UK; and
> (c) a British Citizen or settled in the UK; ….

E-LTRPT.2.3. Either-
(a) the applicant must have sole parental responsibility for the child or the child normally lives with the applicant and not their other parent (who is a British Citizen or settled in the UK); or
(b) the parent or carer with whom the child normally lives must be-
(i) a British Citizen in the UK or settled in the UK;
(ii) not the partner of the applicant (which here includes a person who has been in a relationship with the applicant for less than two years prior to the date of application); and
(iii) the applicant must not be eligible to apply for leave to remain as a partner under this Appendix.

E-LTRPT.2.4. (a) The applicant must provide evidence that they have either-
(i) sole parental responsibility for the child, or that the child normally lives with them; or
(ii) access rights to the child; and
(b) The applicant must provide evidence that they are taking, and intend to continue to take, an active role in the child's upbringing.

Immigration status requirement
E-LTRPT.3.1. The applicant must not be in the UK-
(a) as a visitor;
(b) with valid leave granted for a period of 6 months or less, unless that leave was granted pending the outcome of family court or divorce proceedings;
(c) on temporary admission or temporary release (unless paragraph EX.1. applies).

Section EX: Exception
EX.1 This paragraph applies if
(a) (i) the applicant has a genuine and subsisting parental relationship with a child who-
(aa) is under the age of 18 years, …;
(bb) is in the UK;
(cc) is a British Citizen … ;and
(ii) it would not be reasonable to expect the child to leave the UK; …."

41. By virtue of paragraph R-LTRPT1.1(d), the appellant must meet all the requirements of paragraphs E-LTRPT2.2-2.4 and E-LTRP3.1 and also demonstrate that paragraph EX.1 applies.

42. There is no doubt that the appellant does meet the requirements of E-LTRPT 2.2 as his son is under the age of 18, living in the UK and is a British citizen. There is no requirement to make an application where Art 8 is raised in an appeal (see GEN 1.9(iv))

43. He also meets the requirements of E-LTRPT2.3 because his son lives with his mother who is a British citizen and is not the partner of the appellant.

44. Further, the appellant meets the requirements in E-LTRPT2.4 because he has established that he has "access rights" to his son and I am satisfied that he is "taking, and intend[s] to continue to take, an active role in the child's upbringing." That was, in effect, the finding made by Judge Osborne and I agree with it.

45. Further, the appellant meets the requirements in E-LTRPT3.1 in that the discretionary leave granted to him in 2009 does not disqualify him.

46. Finally, in relation to Section EX.1, there is no doubt that the appellant has a genuine and subsisting parental relationship with his son who is under the age of 18, in the UK and a British citizen. Further, for the reasons I have already given, it would not be reasonable to expect his son to leave the UK.

47. For those reasons which Mr Richards accepted, the appellant does now meet the requirements of the Immigration Rules. That is a significant factor in assessing the proportionality of the appellant's removal at the date of the hearing before me. The Rules recognise his right now, but not previously, to remain in the UK based upon his relationship with his son JLM.

48. Carrying out the balancing exercise required under proportionality, I am satisfied that the right to respect for the appellant's family life and that of his family members outweighs the public interest. That is a conclusion I would have reached even if it was not accepted that the appellant now met the requirements of the Immigration Rules. If the appellant were removed from the UK there would be dire consequences for his genuine relationship with his children and current partner.

49. For these reasons, I remake the decision allowing the appeal under Article 8.

Decision

50. The decision of the First-tier Tribunal to allow the appellant's appeal under Article 8 involved the making of an error of law. I set that decision aside.

51. I remake the decision allowing the appeal under Article 8.

Signed

A Grubb
Judge of the Upper Tribunal

Date:

TO THE RESPONDENT
FEE AWARD

Like Judge Osborne I have allowed the appeal under Article 8 and I have considered whether to make a fee award and I have decided to make a whole fee award of £140 in favour of the Appellant.

Signed

A Grubb
Judge of the Upper Tribunal

Date: