Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/30317/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 10th September 2015	**On 23rd November 2015**

Before

UPPER TRIBUNAL JUDGE KOPIECZEK
DEPUTY UPPER TRIBUNAL JUDGE SAINI

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

and

SS
(ANONYMITY DIRECTION MADE)

Appellant

Representation:
For the Appellant: In person
For the Respondent: Ms R Pettersen, Senior Presenting Officer

DETERMINATION AND REASONS

1. The Appellant in these proceedings is the Secretary of State. However, for convenience we shall henceforth refer to the parties as they were before the First-tier Tribunal.

2. The Appellant is a citizen of Pakistan and is 37 years old. He and his former estranged partner, (whom we shall refer to as "Ms L"), are the parents of Master DJ, born on 30 April 2009. DJ is five years old and lives with his mother, Ms L. Both Ms L and DJ hold Polish nationality. Ms L has

another child, named M, from a prior relationship. M was born on 9 April 2004 and resides with Ms L and DJ.

3. The Appellant entered the UK on 13 March 2007 with a visit visa valid for 6 months. On 28 April 2009, the Appellant applied for an EEA Residence Card as the family member of Ms L. Two days later, on 30 April 2009, DJ was born. On 4 August 2010, the Appellant was issued with a residence card confirming his right to reside as a family member of Ms L which was valid until 4 August 2015. In April 2011, the Appellant and Ms L were married. In May 2012, Ms L petitioned for divorce and in November 2012, the decree absolute was granted.

4. On 13 May 2013, the Appellant applied for further leave to remain under paragraph 248B of the Immigration Rules (as amended) as a person exercising access rights to a child. On 17 June 2013, his application was refused. On 12 September 2013, a judicial review of that decision was lodged. On 15 November 2013, the judicial review claim was settled by consent as a result of the Respondent agreeing to reconsider her decision. Following reconsideration however, the application was refused on 7 July 2014. An appeal was lodged on 22 July 2014 that resulted in the current appeal.

5. The Appellant's appeal was heard by First-tier Tribunal Judge Troup who in a decision promulgated on 17 February 2015 allowed the appeal under the Immigration Rules and under Article 8 of the ECHR. Judge Troup did not consider paragraph 248B of the Immigration Rules as that ground was abandoned. However the appeal was advanced under Appendix FM and Article 8. The Respondent submitted that the Appellant did not meet the relationship requirements with DJ under E-LTRPT 2.2(c) because DJ was neither British nor settled. As Ms L had not submitted a residence card, her evidence of working was limited. Her payslips and P60 were limited to the years 2009 and 2010, and she had produced a 2013/14 Tax Return. Although the evidence of Ms L's employment is incomplete, on balance Judge Troup found that she has been resident and exercising Treaty rights for at least 7 years and had acquired a permanent right of residence under Regulation 15 of the Immigration (European Economic Area) Regulations 2006, which itself implied that DJ as her child had also acquired a permanent right of residence and therefore meets E-LTRPT 2.2. Judge Troup also found that the Appellant met E-LTRPT 2.3 and 2.4 as Ms L was settled here and as access rights to DJ were agreed by Ms L and were regularly exercised. Judge Troup also found that the financial requirements prescribed by E-LTRPT 4.1 and 4.2 were met as the Appellant can satisfactorily maintain and accommodate himself and E-LTRPT 5.1 was met as the Appellant had produced evidence of passing an English language test. Judge Troup went on to consider Article 8 and section 117 of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act") and allowed the appeal under Article 8.

6. The Respondent appealed against the decision of Judge Troup and was granted permission to appeal by First-tier Tribunal Judge Bird on all

grounds. The grounds upon which permission was granted may be summarised as follows:

(i) The judge erred in failing to give adequate reasons for a material finding in relation to Ms L's employment despite her evidence being incomplete;

(ii) The judge erred in making a material misdirection in law as he found that Ms L had acquired a permanent right of residence despite her failing to produce evidence to show that she was exercising treaty rights for a continuous period of five years.

7. The Appellant was unrepresented before us and had not produced a 'Rule 24' Reply. In order to give the Appellant as much opportunity to comment on all he wished to, we heard submissions from Ms Pettersen, followed by a reply from the Appellant, followed by a reply from Ms Pettersen and then queried if the Appellant had anything further to add. He did not. However, given that the Appellant was not represented, we considered that Ms L might have been able to assist us with what was said at the hearing before the First-tier judge, and we heard from her briefly on this issue.

Law

8. We set out here, the relevant parts of E-LTRPT as far as relevant to this appeal:

> **Section E-LTRPT: Eligibility for limited leave to remain as a parent**
>
> **E-LTRPT.1.1.** To qualify for limited leave to remain as a parent all of the requirements of paragraphs E-LTRPT.2.2. to 5.2. must be met.
>
> 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, or where the child has turned 18 years of age since the applicant was first granted entry clearance or leave to remain as a parent under this Appendix, must not have formed an independent family unit or be leading an independent life;
>
> (b) living in the UK; and
>
> (c) a British Citizen or settled in the UK; or
>
> (d) has lived in the UK continuously for at least the 7 years immediately preceding the date of application and paragraph EX.1. applies.
>
> **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) direct access (in person) to the child, as agreed with the parent or carer with whom the child normally lives or as ordered by a court in the UK; 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; or

(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;

E-LTRPT.3.2. The applicant must not be in the UK-

(a) on temporary admission or temporary release, unless the applicant has been so for a continuous period of more than 6 months at the date of application and paragraph EX.1.applies;

or

(b) in breach of immigration laws (disregarding any period of overstaying for a period of 28 days or less), unless paragraph EX.1. applies.

Financial requirements

E-LTRPT.4.1. The applicant must provide evidence that they will be able to adequately maintain and accommodate themselves and any dependants in the UK without recourse to public funds, unless paragraph EX.1. applies.

E-LTRPT.4.2. The applicant must provide evidence that there will be adequate accommodation in the UK, without recourse to public funds, for the family, including other family members who are not included in the application but who live in the same household, which the

family own or occupy exclusively, unless paragraph EX.1. applies: accommodation will not be regarded as adequate if-

(a) it is, or will be, overcrowded; or

(b) it contravenes public health regulations.

English language requirement

E-LTRPT.5.1. If the applicant has not met the requirement in a previous application for leave as a parent or partner, the applicant must provide specified evidence that they-

(a) are a national of a majority English speaking country listed in paragraph GEN.1.6.;

(b) have passed an English language test in speaking and listening at a minimum of level A1 of the Common European Framework of Reference for Languages with a provider approved by the Secretary of State;

(c) have an academic qualification recognised by UK NARIC to be equivalent to the standard of a Bachelor's or Master's degree or PhD in the UK, which was taught in English; or

(d) are exempt from the English language requirement under paragraph E-LTRPT.5.2.; unless paragraph EX.1. applies.

E-LTRPT.5.2. The applicant is exempt from the English language requirement if at the date of application-

(a) the applicant is aged 65 or over;

(b) the applicant has a disability (physical or mental condition) which prevents the applicant from meeting the requirement; or

(c) there are exceptional circumstances which prevent the applicant from being able to meet the requirement.

9. We also set out the terms of section 117A, B and D of the 2002 Act:

117A Application of this Part

(1) This Part applies where a court or tribunal is required to determine whether a decision made under the Immigration Acts—

(a) breaches a person’s right to respect for private and family life under Article 8, and

(b) as a result would be unlawful under section 6 of the Human Rights Act 1998.

(2) In considering the public interest question, the court or tribunal must (in particular) have regard—

(a) in all cases, to the considerations listed in section 117B, and

(b) in cases concerning the deportation of foreign criminals, to the considerations listed in section 117C.

(3) In subsection (2), "the public interest question" means the question of whether an interference with a person's right to respect for private and family life is justified under Article 8(2).

117B Article 8: public interest considerations applicable in all cases

(1) The maintenance of effective immigration controls is in the public interest.

(2) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English—

(a) are less of a burden on taxpayers, and

(b) are better able to integrate into society.

(3) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons—

(a) are not a burden on taxpayers, and

(b) are better able to integrate into society.

(4) Little weight should be given to—

(a) a private life, or

(b) a relationship formed with a qualifying partner,

that is established by a person at a time when the person is in the United Kingdom unlawfully.

(5) Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.

(6) In the case of a person who is not liable to deportation, the public interest does not require the person's removal where—

(a) the person has a genuine and subsisting parental relationship with a qualifying child, and

(b) it would not be reasonable to expect the child to leave the United Kingdom.

…

117D Interpretation of this Part

(1) In this Part—

"Article 8" means Article 8 of the European Convention on Human Rights;

"qualifying child" means a person who is under the age of 18 and who—

(a) is a British citizen, or

(b) has lived in the United Kingdom for a continuous period of seven years or more;

"qualifying partner" means a partner who—

(a) is a British citizen, or

(b) who is settled in the United Kingdom (within the meaning of the Immigration Act 1971 — see section 33(2A) of that Act).

Our assessment

10. Having perused the grounds of appeal and read the decision of Judge Troup, it is clear that the success of the appeal below hinged upon the finding that Ms L was a qualified person for 7 years and had acquired the entitlement to permanent residence and by consequence, so had DJ. The Respondent's grounds allege that the judge noted there were gaps of several years in Ms L's evidence and yet found that she was working as claimed. However his findings did not give sufficient reasons as to why the fact of employment was accepted.

11. Turning to that key finding, the following is stated by the judge:

> "Although the evidence of her employment is incomplete, I find from her evidence that it is more probable than not that [Ms L] has been resident and exercising Treaty rights in the UK for at least seven years and has thus acquired a permanent right of residence under Regulation 15 of the Immigration (EEA) Regulations 2006".

12. The Respondent submits that in the bundle before the First-tier Tribunal, there was no evidence of employment whilst Ms L's bank statements simply showed receipts of child tax credits and working tax credits but no evidence to corroborate self-employment. Given that Ms L was an EEA national, she was entitled to enter the UK according to her free movement rights. However, this did not automatically qualify her to be a settled person, which she could only achieve once she had acquired the right to permanent residence. Therefore, Ms Pettersen submitted that as an EEA national must meet those requirements, an EEA national is not automatically a person without restrictions on their stay.

13. In our assessment, the answer to whether an EEA national is a settled person may be gleaned from paragraph 6 of the Immigration Rules, which states as follows:

"settled in the United Kingdom" means that the person concerned:

(a) is free from any restriction on the period for which he may remain save that a person entitled to an exemption under Section 8 of the Immigration Act 1971 (otherwise than as a member of the home forces) is not to be regarded as settled in

the United Kingdom except in so far as Section 8(5A) so provides; and

(b) is either:

(i) ordinarily resident in the United Kingdom without having entered or remained in breach of the immigration laws; or

(ii) despite having entered or remained in breach of the immigration laws, has subsequently entered lawfully or has been granted leave to remain and is ordinarily resident.

14. Therefore, it can be seen from the above that EEA nationals, such as Ms L and DJ, are not free from any restriction on the period for which they may remain as the Immigration (EEA) Regulations 2006 permit an initial right of entry and residence but not more, without demonstrating that the EEA national is qualified as a worker or self-employed person, for example.

15. The difficulty the Appellant faces is that the evidence put before the Tribunal of Ms L's employment was incomplete for several crucial years resulting in a significant gap in her work history. This omission is of materiality given that which Ms L would need to establish that she has exercised treaty rights for a continuous period of five years, in this instance, by demonstrating her employment for a five year period in order to establish an entitlement to permanent residence. It is necessary for Ms L to establish that she has an entitlement to permanent residence because such status would demonstrate that she is "settled" under paragraph 6 of the Immigration Rules. This status would then apply in turn to her dependent child, DJ, and as a consequence the Appellant would be able to show that DJ is a relevant child under E-LTRPT 2.2(c).

16. It is not apparent to us from reading the decision, whether the judge heard any oral evidence that indicated that Ms L was in employment for the relevant period. The judge records at paragraph 18 of his decision that Ms L is a self-employed cleaner working for 16 hours each week in private houses and that she works on Tuesdays, Wednesdays, Saturdays and Sundays and that she is in receipt of Working Tax Credits, Child Tax Credits, and Housing and Child Benefit. However, none of that establishes Ms L's employment to cement the gaps in the documentary evidence.

17. We asked of the Appellant, what evidence was put before the judge either via documentation or orally of Ms L's work during those gaps in the employment history. The Appellant stated that he did not know. Without objection from Ms Pettersen, we asked Ms L what evidence she had given at the hearing before the First-tier Tribunal. Ms L told us that she had attended the hearing to fight for the rights of DJ and that it was not DJ's fault that his father is from Pakistan. She stated that if the Appellant were to leave the UK, DJ would not see him because DJ will not go to Pakistan and the Appellant will not be able to return here. She told us that DJ has asthma and that she had letters from the school to show the Appellant is helping her with him. She said that she was working previously and is

working now but beyond that she could not remember what she said at the hearing below.

18. The Appellant's oral evidence as recorded in Judge Troup's manuscript record of proceedings was to the effect that Ms L is a cleaner working 16 hours each week. The Appellant's witness statement revealed nothing further in relation to Ms L's previous work.

19. It appears that neither of the Appellant's previous representatives was aware of the evidence it might be necessary to adduce before the First-tier Tribunal or at least, had not focussed their minds upon acquiring that evidence in preparation for the hearing.

20. Consequently, given the above evidence before the judge, we find that the First-tier judge's analysis of whether Ms L was working for a continuous period of five years and thereby acquired entitlement to a permanent right of residence is materially erroneous. In any event, based upon the evidence we have seen, there does not appear to be any evidence to support the judge's conclusions on this matter and they are unsustainable.

21. In conclusion, the judge gave insufficient reasons for concluding that the evidence established that Ms L had acquired a permanent right of residence by reason of the length of her employment. Accordingly, we are satisfied that the First-tier judge erred in law in his conclusions in that respect. That error of law is such as to require the decision to be set aside. We therefore proceed to re-make the decision

22. In re-making the decision under the Immigration Rules, on the evidence before us the Appellant is unable to establish that he can meet E-LTRPT 2.2 in particular. This is because he cannot establish that DJ is "settled" within the meaning given to that term by paragraph 6 of the Immigration Rules. This is because Ms L has not put forward evidence to establish that she was a qualified person for a continuous period of 5 years that would establish her entitlement to permanent residence, which could then be attributed to DJ in turn.

23. Furthermore, E-LTRPT 2.2 is not met because DJ has not lived in the UK continuously for at least 7 years. Consequently, the appeal must fail under the Immigration Rules.

24. We do not consider that there are grounds for considering this matter outwith the Immigration Rules under Article 8 ECHR. However, if we are wrong, we go on to consider the proportionality of the Appellant's removal against the interference with his family life.

25. The questions that we must ask were laid bare in the matter of *Razgar, R v Secretary of State for the Home Department* [2004] UKHL 2, which read as follows:

(1) Will the proposed removal be an interference by a public authority with the exercise of the applicant's right to respect for his private or (as the case may be) family life?

(2) If so, will such interference have consequences of such gravity as potentially to engage the operation of article 8?

(3) If so, is such interference in accordance with the law?

(4) If so, is such interference necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others?

(5) If so, is such interference proportionate to the legitimate public end sought to be achieved?

26. We accept questions 1 and 2 of the *Razgar* test should be answered in the Appellant's favour, in relation to his private and family life. The practical effect of the refusal decision is to require him to return to Pakistan which will lead to disruption to his private and family life.

27. We accept that questions 3 and 4 of the *Razgar* test should be answered in the Secretary of State's favour, and we also accept that in the normal course of events the proposed interference would be proportionate, having regard to the public interest considerations set out in Section 117B of the 2002 Act as amended by the Immigration Act 2014 according to the failure to meet the Immigration Rules.

28. We consider it obvious that it is in DJ's best interests that the Appellant remain in the UK and that he continue to enjoy the affection and care that the Appellant provides as a father. The Appellant has regular contact with DJ although he does not live with him. The Appellant is also responsible for providing DJ with clothes and toys although DJ is not financially dependent upon the Appellant as Ms L made clear in her evidence before the First-tier Tribunal. Had that been otherwise, there may have been consequences pursuant to the ratio in *Zambrano* [2011] EUECJ C-34/09 that we would need to be concerned with such as the deprivation of the enjoyment of DJ's rights as a European citizen and whether the removal of his parent would affect those rights. However, as it is not the case, we do not need to consider that matter. Having established that the Appellant's presence is in DJ's best interests, we go on to consider any countervailing factors.

29. It is in the Appellant's favour that he meets the other requirements of E-LTRPT aside from paragraph 2.2, including the requirement that he is able to maintain and accommodate himself adequately without recourse to public funds. We acknowledge that the Appellant is therefore financially independent with reference to section 117B(3) and we also acknowledge that the Appellant is able to speak English, although in the light of *AM (S 117B) Malawi* [2015] UKUT 0260 (IAC) he cannot obtain any positive benefit from those facts.

30. In any event, against this is weighed the public interest pursuant to section 117B(1). Furthermore, it is also true that section 117B(5) applies as the Appellant has established his private life whilst his status in the UK was precarious which means that little weight can be given to his private life.

31. Further in relation to the question of proportionality, taking into account all the factors, such as the closeness of the Appellant and DJ's relationship and their mutual affection and the separation that may follow, and given the evidence of Ms L as to the importance of the Appellant in her day to day life, alongside the public interest and the fact that the Appellant is unable to meet the requirements of the Rules, there is nothing that tips the balance in the Appellant's favour on the evidence before us. Consequently, we find that removal would be proportionate.

32. For the above reasons, we re-make the decision by dismissing the appeal under the Immigration Rules and under Article 8 of the ECHR.

Decision

33. The decision of the First-tier Tribunal involved the making of an error on a point of law.

34. We set aside the decision of the First-tier Tribunal and re-make the decision, dismissing the appeal under the Immigration Rules and under Article 8 of the ECHR.

Anonymity

35. In order to preserve the anonymity of the children referred to in this decision, we continue the anonymity order made by the First-tier Tribunal. Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, this determination identifies the children and those associated with them by initials only.

Deputy Upper Tribunal Judge Saini 19/11/15