Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/46781/2013

THE IMMIGRATION ACTS

Heard at Glasgow	**Determination promulgated**
on 14 May 2014	**On 16th May 2014**

Before

UPPER TRIBUNAL JUDGE MACLEMAN

Between

AZHAR MEHMOOD

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

For the Appellant: Mr C H Ndubuisi, of Drummond Miller, Solicitors
For the Respondent: Mr A Mullen, Senior Home Office Presenting Officer

No anonymity order requested or made

DETERMINATION AND REASONS

1) The appellant is a citizen of Pakistan, whose date of birth is recorded as 1 January 1978. On 22 May 2013, through his solicitors, he sought further leave to remain on the basis of his family and private life in the UK. The respondent refused that application by letter of 21 October 2013, which says at page 1:

> You were last granted discretionary leave on 28 November 2012 on the basis of ongoing family proceedings in Kirkcaldy Sheriff Court regarding your children. These proceedings concluded on 30 September 2013 with a determination that you were not to be granted any access rights to your 3 children.
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> … The Sheriff … concluded that *"[Mr Mehmood's] desire to avoid deportation is the primary reason why he seeks contact with his children."* As the circumstances under which you were last granted discretionary leave no longer persist and the proceedings concluded with you gaining no further access to your children you have been refused further discretionary leave.

2) The respondent went on to refuse leave under reference to the Rules regarding leave as a parent and in terms of private life, and found no exceptional circumstances which would warrant consideration outside the requirements of the Rules in relation to Article 8 of the ECHR. The appellant was also served with a removal decision.

3) The appellant appealed to the First-tier Tribunal on the grounds that the respondent's decision was "contrary to the Immigration Rules, contrary to law, and inconsistent with Article 8 of the ECHR".

4) First-tier Tribunal Judge Scobbie dismissed the appellant's appeal by determination promulgated on 27 January 2014, his findings being as follows:

> 24. The appellant painted a picture of being a loving father … unfortunately from his point of view the very full Sheriff Court decision … paints a completely different picture … the appellant is painted to be untrustworthy, untruthful and not a good father … the Sheriff is extremely critical of the appellant and concludes that his only interest in his children is as a means of avoiding removal from the UK.
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> 25. Given the very full report of the Sheriff I did not think that it matters that the appellant was not represented. The decision was compiled after a long hearing and evidence from a number of sources. It is perfectly clear that the appellant is legally denied contact with his children … I find it difficult to believe any further action at this time would be successful.
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> 26. I did not believe the appellant's evidence. I do not believe that he still sees his children, at least not with the consent of their mother. It may be that he attends parents' evenings at school but I have little doubt that he does so in a pursuit of his wish to stay in the UK.
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> 27. With regard to the indication that he is father of another child, there is evidence that a firm of solicitors had been approached with regard to him obtaining access to the child. However, it is perfectly clear from a letter marked as "gone away" that the appellant does not even know where the mother of the child is and certainly even by his own evidence the mother of the child does not wish him to have contact.
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> 28. I did not accept that the appellant plays any part in the lives of any of his children. Accordingly, there is no basis for continuing discretionary leave.

5) These are the grounds of appeal to the Upper Tribunal:

> 1 Judge Scobbie failed to apply … *MS* (Ivory Coast) [2007] EWCA Civ 133 indicating that where a parent is pursuing contact that forms the basis for further extension of discretionary leave until the termination of the contact hearing. The appellant's family law solicitors provided a letter confirming that a minute of variation will be lodged in view of the fact that the appellant continues to have contact with his children. Further there were two letters from the appellant's other solicitors confirming that they are awaiting grant of legal aid in order to raise an action for contact in respect of the other child of the appellant from a different relationship … The appellant has outstanding family law proceedings and … dismissal of his immigration appeal … is a disproportionate interference with the appellant's Article 8 rights.
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> 2 … The judge erred in law in his findings at paragraph 25 … speculating as to the chances of success in respect of the appellant's contact action … In coming to this conclusion the

judge is making a decision that is not open to him in respect of the appellant's family contact proceedings.

6) Further to the grounds of appeal, Mr Ndubuisi said that although the appellant's action failed in the Sheriff Court, as at the date of the hearing in the First-tier Tribunal the evidence was that he was seeking a variation in respect of those 3 children, and that he was initiating proceedings to pursue contact with a further child. The judge failed to identify the correct issue, which was whether there were any ongoing proceedings and whether these engaged the Article 8 rights of the appellant. He fell into speculation as to whether there was any prospect of success in the action relation to the fourth child. It was highly significant that the appellant had not been represented at the Sheriff Court, and the proceedings there had therefore been unfair. The respondent's policies required discretionary leave to be continued until all possible contact proceedings were exhausted. The determination should be set aside for error of law.

7) As an additional point, Mr Ndubuisi said that the judge erred by considering the appellant's case in relation to the Immigration Rules, paragraph 276ADE, rather than in relation to the respondent's policy where proceedings regarding children are in progress.

8) Responding to the error of law submission, Mr Mullen said that the grounds were not directed to any failure to have regard to policy, but in any event the Tribunal was correct to look firstly at the law and the Rules rather than at policy. The judge correctly based his conclusions on the facts then current, being that the appellant had comprehensively and very recently lost his case regarding the children in terms of a judgment by the Sheriff rejecting any form of contact. Judge Scobbie's recital of the relevant matters and his factual findings were not and could not be challenged. The evidence was not that there were ongoing proceedings, but that the appellant had made a highly tentative approach to solicitors with a view to seeking a variation. Mr Mullen referred to a letter dated 22 January 2014 from JS Grosset, Solicitors, Leven (instructed by the appellant in relation to the contact proceedings) sent to Drummond Miller (his solicitors in these proceedings). The letter makes it plain that the involvement of his solicitors is at a very early stage, and that to take the matter back to court so soon after an adverse decision following the proof would require showing a change of circumstances. The letter continues "Mr Mehmood *claims* that the children or at least two of them still see him occasionally on an informal basis" (Mr Mullen's emphasis). Legal aid had not been applied for and no minute of variation had been lodged. Although the judge did not refer to that letter directly he did not have to rehearse every item of evidence before him and it was part of the underpinning of his conclusion that there were no likely prospects of success in any new action. That was derived from the evidence presented by the appellant himself. It was difficult to see how any judge could reasonably have concluded otherwise. As to the fourth child (or alleged fourth child) paragraph 27 was sufficient to explain why the proposal for contact in that respect was also going nowhere.

9) Mr Ndubuisi in response said that the appellant had taken all the steps that he could in relation to the first 3 children, and that the judge was not entitled to conclude that there were no merit in his proceedings and no likely prospects of success. As to the fourth child, it was shown by items at pages 112 and 113 of his productions in the First-tier Tribunal that he had consulted solicitors (another firm) and legal aid had been obtained.

10) Mr Ndubuisi indicated that if error of law were to be found he would seek admission of updating evidence. Mr Mullen indicated that he would seek admission of evidence casting doubt on the appellant's allegations regarding any change of circumstances in relation to the appellant's contact with his older children, and the reliability of his allegation that he had some ongoing contact. Each party agreed to admission of the additional evidence from the other, if further hearing was required. As there was no time to undertake hearing of evidence on 14 May 2014, unless at the expense of other cases, I reserved my determination at that stage.

11) The appellant has not shown that case law or the respondent's policies require that an appellant who wishes contact with children is entitled to remain in the UK until matters are resolved beyond all further legal resort. Proceedings in relation to children and contact are probably never beyond being visited upon change of circumstances, but that does not mean that an appellant is entitled to prolong discretionary leave simply by saying that he proposes to revert to the court. Removal while an application for contact is outstanding may often amount to a disproportionate interference with Article 8 rights, but like all Article 8 issues, this must ultimately depend on the facts and circumstances of the particular case.

12) The appellant came out very badly from the Sheriff Court decision. Mr Ndubuisi did not support his submission that absence of representation meant that the proceedings there were automatically unfair to the appellant by any reference to authority. The submission implies a severe criticism of the Sheriff. I do not find it to be sound. The First-tier Tribunal Judge was entitled to rely heavily on the Sheriff Court decision. If not bound to do so, departure would at least have required some strong evidence pointing another way. There was none.

13) The First-tier Tribunal Judge was entitled to come to an adverse view of the appellant as a witness, and there are no grounds directed against his findings in that respect.

14) There was nothing before the First-tier Tribunal Judge to suggest any meaningful change of circumstances in relation to the 3 older children, and I am not persuaded that there is any error of law in the conclusions reached by the First-tier Tribunal Judge. (It is not necessary to go further than that for present purposes, but in relation to these children it would have been surprising and perhaps even perverse for any judge to have concluded otherwise.)

15) The only point which gives me pause is in relation to the fourth child, or alleged child, of the appellant. Paragraph 27 of the determination by itself seems adequate to explain

why the matter was not thought to justify the appellant remaining in the UK. The judge says that the appellant did not know where the mother of the child was, and she did not wish him to have any contact. He might even have gone further and said that in the context of the other findings and the mother's denial of paternity he did not accept on balance that the child is the appellant's. While the issue is not well focused in the grounds of appeal it emerged eventually on 14 May 2014 that at the date of the First-tier Tribunal hearing the appellant had obtained legal aid for an action seeking declarator of parentage, contact, and a parental rights and responsibilities order. Page 113 is a letter from the Scottish Legal Aid Board dated 8 January 2014 acknowledging the appellant's application and page 2 is a letter dated 9 January 2014 from his solicitors advising that legal aid has been approved and asking him to make a further appointment. That takes him further than paragraph 27 of the determination suggests.

16) On the other hand, it does not appear that the appellant provided the First-tier Tribunal with any further meaningful information about this child. I was not referred to anything in the evidence which provides even a gender, name or date of birth or which suggests that (apart from alleged parentage) the appellant has had any contact with the child at all. In relation to his older 3 children the Sheriff found in fact that it would be not conducive to their welfare to have contact with the appellant (¶ 5 of his judgment). The Sheriff went on to say that the children required to be protected from abuse or risk of abuse on the part of the appellant, and that their need to be protected would not be served by the grant of an order for contact in his favour (¶ 71).

17) To conclude, like the Sheriff, that the appellant's desire to avoid removal is the primary reason why he seeks contact with his children is far from speculative; rather, it is much more likely than not. Looking at the determination as a whole and at the underlying evidence, I see no error such as to entitle or require the Upper Tribunal to interfere with the First-tier Tribunal judge's findings that the appellant plays no part in the lives of any of his children and that there is no basis on which he should have continuing discretionary leave.

18) The appellant's appeal to the Upper Tribunal is dismissed. The determination of the First-tier Tribunal shall stand.

Hugh Macleman

15 May 2014
Judge of the Upper Tribunal