Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/28747/2012

THE IMMIGRATION ACTS

Heard at : Field House	**Determination Promulgated**
On : 14th November 2013 & 2nd January 2014	**On : 8th January 2014**
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Before

Upper Tribunal Judge McKee

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

REJAUL KARIM CHOWDHURY

Respondent

Representation:

For the Appellant: Miss Alice Holmes of the Specialist Appeals Team
For the Respondent: Mr T. Chowdhury of Kingdom Solicitors

DETERMINATION

1. During the currency of his leave to enter the United Kingdom as a Tier 4 (General) Migrant, Mr Chowdhury married a British citizen, Jahanara Begum Uddin, on 4th January 2012, and applied for variation of his leave on 21st March 2012. Before this application was determined, Mrs Jahanara wrote to the Border Agency on 10th July

2012, to say that she had gone back to live with her mother and that she regarded the marriage as at an end. Since E-LTRP 1.7 of Appendix FM requires that "*the relationship between the applicant and their partner must be genuine and subsisting*", the application to vary leave clearly fell to be refused under the Immigration Rules, and it was indeed refused, on private as well as family life grounds, on 27th November 2012. Notice of appeal was faxed to the First-tier Tribunal by Universal Solicitors on 12th December, with lengthy grounds based on the rather surprising assertion that the appellant and sponsor were intending to live together permanently.

2. The appeal was listed for hearing on 19th February 2013, but Kingdom Solicitors, to whom Mr Chowdhury had transferred his instructions, submitted Further Grounds of Appeal based on the fact that Jahanara Begum had given birth to their client's son on 15th December 2012, and that an application for a Contact Order was to be heard by the Aldershot and Farnham County Court on 13th March. This, it was contended, meant that Mr Chowdhury qualified either for limited leave as a parent under Appendix FM, or for leave under EX.1(a).

3. The case was accordingly put back to 9th April, while on 13th March District Judge King made an order in the County Court for two sessions of 'observed supervised contact' of one hour each, to be followed by 'supported contact' for one hour every fortnight, for at least eight sessions, at the Camberley Contact Centre. When the appeal came before Judge Hanes at Taylor House on 9th April, she adjourned the proceedings (according to her handwritten note) in order for the respondent to consider whether the decision under appeal should be withdrawn and whether the appellant could then make a fresh application (presumably for leave to remain as a parent).

4. The case was set down for a Case Management Review Hearing before Judge Blake on 6th June, when the Presenting Officer indicated that the decision of 27th November 2012 was to be maintained. The case was accordingly set down for a full hearing on 30th August, and in a very short determination (a little over a page) Judge Andonian allowed the appeal "*both under the immigration rules and under Article 8*." The judge did not specify which immigration rules he had in mind, and that was one of the grounds of appeal to the Upper Tribunal. The second ground was that, in allowing the appeal under Article 8 outside the Rules, the judge had not identified any 'exceptional circumstances' which, it was said, had to be present in order to justify such an outcome. The third ground was that Mr Chowdhury should have made "*a separate application under the Immigration Rules*." Which rule this should have been is not specified, but presumably it is R-LTRPT of Appendix FM, this rule having been suggested in the first ground as being the most likely candidate for allowing the appeal under the Rules.

5. Permission was granted by Judge Cruthers, and when the matter came before me Miss Holmes thought that R-LTRP must have been meant in her colleague's grounds of appeal, rather than R-LTRPT, i.e. leave to remain as a partner rather than as a parent. But the marital relationship having completely broken down, what Judge Andonian was focusing on was the relationship between the British child and his father. It was clear, however, that the judge had totally failed to check whether Mr Chowdhury really did succeed under the relevant immigration rule. R-LTRPT is indeed the relevant rule, but Judge Andonian made no mention of it, and did not run

through any of its requirements to see whether they were satisfied by the appellant. Accordingly, the judge had no basis for allowing his appeal under the Rules.

6. As to whether Judge Andonian was entitled to find that the appeal succeeded under the family life aspect of Article 8, it seems that, in assessing the strength of the family life tie between father and son, he misunderstood the amount of contact which Mr Chowdhury was having with Mohammed Uddin. He says that Jahanara Begum had "*made the child available for contact for two sessions of observed supervised contact for one hour once a week at a contact centre.*" This ostensibly means ongoing contact on a weekly basis. This interpretation is confirmed when the judge writes, a little further on, that "*the child is seeing the father on a supervised basis at the centre.*" But that was not so. There had been two one-hour sessions in total of 'observed supervised contact'. The first took place on 25th June, the second on 16th July. There was no evidence before Judge Andonian that the eight fortnightly sessions of 'supported contact' at Camberley Contact Centre, ordered by District Judge King, had commenced by the date of the hearing on 30th August. It was premature for the First-tier Tribunal to suppose that continuing regular contact between Mr Chowdhury and Mohammed would be authorized, such as to permit family life between the two to be developed in the United Kingdom.

7. I found therefore that the Article 8 aspect of the First-tier determination was infected by material error, and that the judge's decision on it had to be set aside, along with his decision under the Immigration Rules. On the other hand, the respondent's decision to remove Mr Chowdhury under section 47 of the Immigration, Asylum and Nationality Act 2006 was unlawful at the time when it was made, and Miss Holmes helpfully withdrew it. The decision on the appeal against the refusal to vary the appellant's leave would now have to be re-made by the Upper Tribunal, and for that purpose the matter was listed before me again on 2nd January this year.

8. I heard oral evidence from the appellant, who was cross-examined by Miss Holmes. Fresh documentary evidence was also available, included in an Appellant's Bundle prepared by Kingdom Solicitors. In a nutshell, the appellant's case is that he qualifies for leave to remain as a parent under Appendix FM to the Immigration Rules (with EX.1(a) as a fall-back position). I discussed with the two representatives whether I had jurisdiction to determine the appeal on this basis, since the application made by the appellant was for leave to remain as a partner, not as a parent, and section 3C of the Immigration Act 1971 does not allow an application to be varied once there has been a decision on it. However, as Mr Chowdhury argued, there is provision under section 86(2) of the Nationality, Immigration and Asylum Act 2002 for the Tribunal to determine "*any matter raised as a ground of appeal*", and as a majority of the Court of Appeal held in *AS (Afghanistan)* [2009] EWCA Civ 1076, the Tribunal may consider any grounds raised in response to a 'one-stop notice' issued under section 120 of the 2002 Act, even if those grounds do not relate to the decision under appeal. The Notice of Refusal in the instant case does include a 'One-Stop Warning', inviting the appellant to state any additional grounds which he may have for wishing to remain in the United Kingdom, and the view of the majority in *AS (Afghanistan)* has been approved in *Patel & ors* [2013] UKSC 72. Lord Carnwath cited the following passage from the IDIs of September 2006 :

> "[I]t is possible to vary the grounds of an application already made, even by introducing something completely new. A student application can be varied so as to include marriage grounds. If an application is varied before a decision is made, the applicant will be required to complete the necessary prescribed form to vary his application. If an application is varied post-decision, it would be open to the applicant to submit further grounds to be considered at appeal. … Once an application has been decided it ceases to be an application, and there is no longer any application to vary under section 3C(5). So any new information will fall to be dealt with during the course of the appeal rather than as a variation of the original application."

9. That there is jurisdiction to consider whether the appellant qualifies for leave to remain as a parent finds confirmation also from the rule itself. R-LTRPT 1.1(b) originally required that "*the applicant must have made a valid application for limited leave as a parent*." From 13th December 2012, by means of HC 760 the words "*or indefinite*" were inserted after "*limited*", while the words "*or partner*" were inserted after "*parent*". These amendments happened after the date of decision in the present case, but on an in-country appeal I am not restricted to the circumstances obtaining at the date of decision. The rule itself now envisages leave to remain as a parent being granted to someone who applied for leave to remain as a partner, which is what this appellant did.

10. As Mr Chowdhury did in his submissions, I shall run through the eligibility requirements of Section E-LTRPT, since the appellant clearly satisfies R-LTRPT. For E-LTRPT 2.2, the appellant's child is under 18 years of age, is living in the UK, and is a British citizen. For 2.3, the parent with whom the child normally lives is a British citizen and is not (any longer) the partner of the applicant. E-LTRPT 2.4(a)(ii) requires evidence of access rights to the child, and the appellant has indeed provided evidence that the eight sessions of 'supported contact' ordered by District Judge King, to follow on from the 'observed supervised contact' last June and July, have been taking place at the Camberley and District Family Contact Centre. After a pre-contact meeting on 12th October last year, the appellant has had sessions of 1¼ hours each with his son on 26th October, 9th and 23rd November, and 14th and 21st December. The last such session is scheduled for 11th January. On 14th January there will be a Review of the contact arrangements at Aldershot & Farnham County Court, as directed by District Judge King on 13th September last, at which the appellant will ask for more frequent contact. In my experience of Family Law, this is almost certain to be granted. Unless the appellant is deemed unsuitable for contact ~ and he has done nothing to justify this ~ it will be considered to be in the child's best interests for him to have increased contact with his father.

11. E-LTRPT 2.4(b) requires evidence that the appellant is taking, and intends to continue to take, an active role in the child's upbringing. Clearly, the appellant is very restricted in what he can do right now, as his estranged wife will not voluntarily allow contact and he is still in the early stages of the Children Act regime. But the expectation is that contact will be gradually widened, so that eventually the child will be allowed to spend a whole day with his father, and then to stay overnight. The rule itself must be wide enough to encompass the very early as well as the final stages of the contact process. The appellant has certainly been doing as much as he can so far to play an active role in his child's upbringing. He has been paying child maintenance, and although he got into arrears, he has been paying these off since last October. He brought a present for his son's first birthday after, very properly,

seeking the mother's consent to this through the Co-ordinator at the Family Contact Centre. He has diligently travelled to Camberley for every contact session. There is no reason to suppose that the appellant will stop trying to play an active role in his son's life if and when he gets leave to remain. The leave will only be for 2½ years in any event, and if he does not continue to take an active part in his son's upbringing, the appellant will not get any further leave.

12. The appellant does not fall foul of the 'immigration status requirement' in E-LTRPT 3.1-3.2, and has provided evidence of adequate maintenance. He has been working for McDonalds, but only part-time, as is consonant with his statutorily extended leave to remain as a student. He is paid fortnightly, and I have before me pay slips dated 27th July, 10th August, 5th October, 19th October and 2nd November 2013. On those dates he was paid £293, £283, £338, £365 and £293 respectively (omitting the figures in pence). The current level of Income Support for a single adult is £71.70 per week. Even taking into account his rent and child maintenance, the appellant still has more than that by way of disposable weekly income. His rent is £50 per week, a low figure, but it appears on his Tenancy Agreement, and the reason it is so low is, according to the appellant, that he shares the flat in Whitechapel with others (including the landlord, another gentleman of Bangladeshi origin). Such an arrangement is perfectly feasible within the Bangladeshi community. The appellant is also paying Child Maintenance of £65.45 per month, although it is currently more than this until the arrears are paid off in March. We may be sure that these payments will not reduce his income below the Income Support threshold. The Child Support Agency, which worked out how much he had to pay, would not allow that. In the future, if the appellant's leave to remain as a student is replaced by leave to remain as a parent, he will be able to work full-time rather than part-time, so there is every likelihood of adequate maintenance in the future.

13. E-LTRPT 4.2 requires evidence of adequate accommodation, but the evidence is no longer 'specified', and there is no definition of adequacy, save to rule out accommodation which is overcrowded or which contravenes public health regulations. The rule does not in terms require an applicant to prove that his accommodation is <u>not</u> overcrowded and does <u>not</u> contravene public health regulations, and it would be inappropriate to insist upon proof of the negative in the present case.

14. Finally, E-LTRPT 5.1(b) requires the appellant to 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*." The appellant has an Entry Level Certificate in ESOL Skills for Life (Speaking and Listening), awarded in January 2012 by Trinity College, London, which is listed at Appendix O of HC 395 as satisfying the level A1 requirement.

15. The upshot of all this is that the appellant satisfies all the requirements of the Rules for the grant of limited leave to remain as a parent. There is no need to fall back upon EX.1(a) of Appendix FM, or indeed to consider Article 8 outside the Rules.

DECISION

There being material errors of law in the First-tier determination, the Secretary of State's appeal to the Upper Tribunal is allowed, and the decision on the appeal is re-made by the Upper Tribunal. The appeal is allowed under the Immigration Rules.

Richard McKee
Judge of the Upper Tribunal

5th January 2014