



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: IA/42570/2013

THE IMMIGRATION ACTS

Heard at Bradford

On 15th May 2014

Determination

Promulgated

On 8 July 2014

Before

UPPER TRIBUNAL JUDGE REEDS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MERRICK CLEVELAND SINCLAIR

Respondent

Representation:

For the Appellant: Mr M Diwnycz, Senior Presenting Officer

For the Respondent: Mr C Cole, Solicitor, Parker Rhodes Hickmotts Solicitors

DETERMINATION AND REASONS

1. This is the Secretary of State's appeal against the decision of the First-tier Tribunal (Judge Birkby), who in a determination promulgated on 13th January 2014 allowed the appeal of the Respondent against the decision of the Secretary of State to refuse leave to remain under the provisions of Appendix FM and paragraph 276ADE of the Immigration Rules.

2. Whilst this is an appeal by the Secretary of State, for convenience I will refer to the parties in the determination as they appeared before the First-tier Tribunal.
3. The history of the appeal is as follows. The Appellant is a citizen of Jamaica born on 7th February 1973. He entered the United Kingdom as a visitor on 6th October 1999 with leave to enter until 5th April of that year. On 22nd September 2000 he married his partner Kim Karen Ann Browne and on 26th June 2004 he applied for leave to remain as a spouse of a settled person. It took the Secretary of State until 10th February 2009 to consider that application. By which stage the Appellant became the father of three children with his partner, P born on 4th August 2001, M born on 31st August 2003 and S born on 7th July 2006. That application was subsequently refused on the basis that he had not provided adequate evidence to show that the marriage was subsisting. It is also right that at that time he had two children that he stated were born in Jamaica living in Birmingham then aged 14 and 11. It appears that he had not seen his son since he was 3 as his partner would not let him have contact with the children without making financial contributions to their welfare. The Appellant lodged an appeal against that decision and on 23rd June 2009 the appeal came before First-tier Designated Judge Shaerf who dismissed the appeal on the basis that the marriage was not subsisting. Therefore by 25th August 2009 the Appellant was appeal rights exhausted.
4. On 19th August 2013 further representations were made in respect of an application to remain in the United Kingdom on human rights grounds. In a letter of 4th October 2013 the Respondent set out the reasons for refusing those representations by reference to Appendix FM and paragraph 276ADE of the Immigration Rules. The letter set out the Appellant's immigration history and accepted that in the circumstances he met the suitability requirements for family and private life to be considered under Appendix FM, the new Rules. As to the eligibility grounds as a partner, the letter noted that the Appellant had not provided evidence of cohabitation and at paragraphs 14 to 16 took into account the past determination of Judge Shaerf noting that in 2009 he was not in a subsisting relationship with his partner and therefore could not meet the requirements for the partner route. As to the route as a parent, at paragraph 12 it set out the eligibility requirements and at [19] whilst it had been established that he was the father of at least two children, P and M, it was indicated that the children lived with her and therefore he failed to satisfy E-LTR2.3 of Appendix FM. It was also stated that there was little evidence to show an active role in their upbringing at [20]. It was also stated that regard had been given to Section EX under Appendix FM but it was noted that there was no evidence to suggest he had children in the United Kingdom for whom he had parental responsibility nor was it accepted that he was in a genuine and subsisting relationship with a British citizen and therefore failed to meet EX1(a) and (b). As to paragraph 276ADE of the Immigration Rules, the Respondent set out the reasons why the Appellant could not meet those requirements either.

5. The Appellant exercised his right to appeal that decision and the case came before the First-tier Tribunal (Judge Birkby) at Bradford on 23rd December 2013. The judge had the advantage of hearing the Appellant give evidence and for that to be the subject of cross-examination and he set out his findings and conclusions at [23]-[31] of the determination.
6. The findings of fact can be summarised as follows. In relation to his application on the basis as a partner which was based on his relationship with Kimberley the judge considered his claim that they lived together in Sheffield and that they were the parents of four children now, P born 4th August 2001, M born 31st August 2003 and S born on 7th July 2005 and L born on 7th October 2012. At [28] he accepted that the Appellant was the biological father of two of the four children as he had seen birth certificates relating to two of them but found on the basis of the overall evidence before him that he was satisfied that he was the biological father of all four children. He noted that his partner had a child from a previous relationship (B) who was now living in London independently. At [23] the judge was not satisfied that the Appellant had demonstrated that he lived at the home of his wife on a regular basis and from the evidence found it to be inconsistent and lacking in credibility. The example given was that he could not name the children's school at the mitigating circumstances interview despite an assertion that he picked the children up from school. Therefore the finding made by the judge was that he sees his wife and children in Sheffield but does not live with them on a permanent basis. He reached the conclusion that this was not a subsisting relationship "akin to marriage".
7. As to the relationship with the children, the judge was satisfied that he was the father of the four children in Sheffield set out earlier. At [24] the judge accepted that he had an ongoing relationship with the four children in Sheffield. He made findings in relation to the evidence. Firstly, he paid regard and weight to the photographs of the Appellant with the children (see [22] and [24]) that had been provided before him which he accepted. Secondly, he placed weight upon letters from three of the children which he described as being in "different handwriting" and therefore found them to be "clearly written by the children". From those letters he reached the conclusion that they indicated an ongoing relationship between the Appellant and his children. At [24] the judge said this:-

"I believe that the Appellant goes to the house of the children and his wife on a relatively regular basis and I have concluded that were he to return to Jamaica the children are likely to be seriously upset about the fact that they are not able to see him. I am not satisfied that they would be able to visit him on a regular basis in Jamaica and no doubt the Appellant would have difficulties bearing in mind his immigration history, being able to return to the UK from Jamaica to visit the four children."

As to the children in Sheffield and his wife, at [27] the judge was not satisfied that he assisted his wife to the extent claimed and did not accept he assisted the children in their travel to and from school although he did accept that he will have assisted on occasions and that "there was a degree

of plausibility and consistency within the evidence that the Appellant generally did assist although that was exaggerated”.

8. Other findings that were made by the judge include the following. At [28] that the Appellant had to an extent an active role in the children’s upbringing and concluded that although his parental responsibility to his children had been largely that of his wife, he had a degree of parental responsibility. At [30] the judge found that the Appellant enjoyed family life in the UK with four of his children although he did not live with them but that he saw them and assisted them to the extent on a relatively regular basis. He found their best interests were that they were to continue to have a relationship with their father and that there was no evidence to show that their father, the Appellant, had not shown interest in them over the years and that the evidence in fact was the opposite in this case. At [30] the judge reached the conclusion that he provided some financial assistance but it was limited. At [31] he found the best interests of the children were that they maintained a relationship with the Appellant which he found to be “currently ongoing”. He placed weight upon the letters that had been placed before the Tribunal and found that the relationship was expressed in those letters. He found that if the Appellant were to be removed there was a likelihood that all contact would be severely limited. The Appellant would have difficulty obtaining a visa to return, even if he could afford the expense and the children, who were British citizens, would have difficulty financially in visiting the Appellant in Jamaica. The judge considered modern methods of communication but found:-

“Bearing in mind I accept that there is a significant degree of face-to-face contact currently the Appellant’s removal to Jamaica would, I believe, seriously affect the emotional wellbeing of the children if they could not see him on a regular basis.”

He did not consider that it was reasonable for the children to move to Jamaica as they were British citizens and lived all their life in the United Kingdom and that there would be obstacles for them to live in Jamaica which were too great to be acceptable. He found that their lives would be in turmoil. Thus he also found it was unreasonable for the Appellant to return to Jamaica with the consequences that there would be for the wellbeing of the four children.

9. As to other children in the UK, MS born in 2004 and LS born in 1997, the judge found at [25] as to the two children living in Birmingham he believed the Appellant to have some contact over the years but this was on a “casual and infrequent basis” (see [25]).
10. The judge, when applying the law at [28] under Appendix FM found that the Appellant had an active role in the child’s upbringing and stated that he was “not satisfied that the Respondent assertions that the Appellant has not met the requirements of Section EX(a) with regard to a parental relationship with the child, pursuant to Appendix FM of the Immigration Rules”. He later went on to say “I do not accept that the Respondent has established that the Appellant

has failed to satisfy the requirements of E-LTR2.3 of Appendix FM of the Rules". He then stated at [29]:-

"Mr Cole did not however, specifically detail how the Appellant would meet the requirements of Appendix FM. I have therefore considered the Appellant's case in the light of the case law generally, in particular the case of **Razgar [2004] UKHL 27** and in the light of Article 8 under the Convention."

He then undertook a "classic Article 8 assessment" and at [32] allowed the appeal under Article 8 of the ECHR.

11. The Secretary of State sought permission to appeal that decision and permission was granted by the First-tier Tribunal Judge Grimmett on 1st April 2014.
12. Thus the appeal came before the Upper Tribunal. Mr Cole, who appeared in the court below for Mr Sinclair, appeared before the Upper Tribunal and the Secretary of State was represented by Mr Diwnycz. Mr Diwnycz stated that he relied upon the grounds which asserted that firstly the judge erred in its approach to the Article 8 assessment that **MF Nigeria [2013] EWCA Civ 1192** confirmed the Immigration Rules are a complete code and form the starting point of the decision maker and that any Article 8 assessment should only be made after consideration under the Rules. That was not done in this case and thus the Tribunal erred in law by not having regard to the Rules and thus the subsequent proportionality assessment was unsustainable. It was also stated at paragraph 3 of the grounds that the decision of **Gulshan [2013] UKUT 00640**, that the Article 8 assessment should only be carried out where there are compelling circumstances, the judge did not identify any such compelling circumstances and therefore the findings are unsustainable. And at paragraph 4 of the grounds it was asserted that the Tribunal had not followed the approach in **Gulshan** or **Nagre**. As to ground 5 in which it was submitted that the Tribunal had failed to provide adequate reasons as to why it was accepted by the judge that the Appellant had a genuine and subsisting relationship with his children, Mr Diwnycz said that he did not strongly rely on that as it was not a particularly strong ground.
13. Mr Cole on behalf of the Appellant made reference to his Rule 24 response and submitted that the way the determination had been set out, and the grounds in which it was suggested that the judge did not apply the Immigration Rules, was not an accurate assessment. He further submitted that the suggestion in the grounds that the judge erred in law by not having regard to the Rules was incorrect as as at paragraph 28 the judge did have regard to the Rules and he accepted that he could meet them. He highlighted the difficulty with a case where the Appellant had relied upon the partner route and that under the construction of the Rules you cannot succeed under the parent route if you have a partner. However the judge rejected the claim under the partner route thus it was the findings under the "parent route" that were important. He conceded that

the judge at paragraph 28 when dealing with the Rules did not perhaps put it in the clearest way but when reading the determination as a whole it was clear what the conclusion was. He submitted by going through the Rules, he could satisfy the Immigration Rules and where looking at access rights, all that meant was that he was having contact to the children and that was a finding of fact that was clearly made by the judge throughout the determination. As to taking an active role, the findings at [24] and [28] when read together demonstrate that he was playing an active role in the upbringing of the children and therefore he had met EX1(a)(i) that the Appellant had a genuine and subsisting relationship with a child and also (ii) that it would not be reasonable to expect the child to leave the UK. The judge found that to be the position at paragraph [30] and [31] of the determination. Thus he could meet the Rules.

14. Mr Cole conceded that it was not the best structured determination and it was not clear what Rule had been relied on but when the determination was read as a whole and referred back to the issues that he decided, his findings of fact were clear about the role of the Appellant, that there was a significant degree of face-to-face contact, that there was a genuine and subsisting relationship with children who were British citizens where it was not reasonable for them to leave the United Kingdom. The findings did demonstrate that he was undertaking an active role in the child's upbringing and overall, the judge applied the general principles under the Rules and therefore there was no material error of law. Thus it was a sustainable decision.
15. As to ground 5, whilst Mr Diwnycz did not place much reliance upon it, ground 5 gave some appearance of a perversity challenge but that could not be right because the judge had heard the evidence and it was open for him to put weight upon the evidence of the children detailed at an age appropriate level and to reach the conclusion there was an ongoing involvement in their upbringing. Those letters were at page 13, page 15 and page 16. Thus there was sufficient evidence for the judge to reach those conclusions.
16. Mr Diwnycz by way of reply posed the question as to how you defined an active role with a child, and if it was described that you see the children and you undertake their care during those periods, that would fit the definition.
17. At the conclusion of the submissions I reserved my decision.

Discussion

18. The grounds at paragraphs 1 to 4 advanced by the Secretary of State are that the judge erred in law in its approach to the Article 8 assessment. There is no doubt in my judgment that the determination does not follow the structured approach that is now settled law (in accordance with the guidance set out in **MF (Nigeria) [2013] EWCA Civ 1192**, the High Court in **Nagre [2013] EWHC 720 (Admin)** and by the Upper Tribunal in

Gulshan [2013] UKUT 640, as confirmed by **Shahzad (Article 8: legitimate aim) [2014] UKUT 00085 (IAC)**). These judgments have made it clear that the question of proportionality must be looked at in the context of the Immigration Rules with no need to go on to a specific assessment under Article 8 if it is clear from the facts that there are no particular compelling or exceptional circumstances requiring that course to be taken. That is an approach consistent with the Court of Appeal in **MF (Nigeria)** and **Huang**. In **Shahzad** it was found that where an area of the Rules does not have an express mechanism, such as found in deportation appeals, the approach of **Nagre** and **Gulshan** should be followed that after applying the requirements of the Rules, only if there may be arguably good grounds for granting leave to remain outside them is it necessary for Article 8 purposes to go on to consider whether there are compelling circumstances not sufficiently recognised under them. Thus the starting point of the judge was to look at the Rules and to see if the Appellant could meet those requirements. The judge began his consideration of the issue by considering Appendix FM of the Immigration Rules at [28]. It is necessary to set out this paragraph in full:-

“28. I have concluded, considering Appendix FM of the Immigration Rules, the Appellant has shown that he has to extent had an active role in the children’s upbringing. I have also concluded that although his parental responsibility for his children has been largely that of his wife, he has had a degree of parental responsibility. His children furthermore are British citizens. Although the Respondent stated that it was not accepted that the Appellant was in a genuine and subsisting relationship with a British citizen, I do not accept that that is the case. I am not satisfied as to the Respondent’s assertions that the Appellant has not met the requirements of Section EX(a) with regard to a parental relationship with a child, pursuant to Appendix FM of the Immigration Rules. The Appellant does not meet the private life criteria under paragraph 276ADE(iii) to (vi) of the Immigration Rules. However, I accept that the Appellant is the biological father of his four children in Sheffield, birth certificates have been shown for two of them, and I do not believe there is any reason why the Appellant will fail to be credible with regard to the paternity of the other two children. I do not accept that the Respondent has established that the Appellant had failed to satisfy the requirement of E-LTR2.3 of Appendix FM of the Rules.

29. Mr Cole did not, however, specifically detail how the Appellant would meet the requirements of Appendix FM. I have therefore considered the Appellant’s case in light of the case law generally, in particular the case of **Razgar [2004] UKHL 27** and in light of Article 8 under the Convention.”

19. Paragraph 28 appears to give the appearance that on the findings of fact made by the judge that he was satisfied that the Appellant had met the requirements of the Immigration Rules. However at [29] recorded above, and further in the light of what was said at [22] that the submissions were made “in general terms with regard to Article 8. He did not go into details about the Respondent’s analysis of the Appellant’s position under the Immigration

Rules in particular with regard to paragraph 276ADE or Appendix FM". Thus at paragraphs [22] and [29] it does not appear that he was directed to the provisions of the Immigration Rules either under Appendix FM or paragraph 276ADE and therefore the judge found it necessary to consider the case "in light of Article 8 of the Convention".

20. In the light of the settled case law, and as set out above, that was a legal error. It was incumbent upon the judge to apply the Rules and if he could not meet the Rules only if there may be arguably good grounds for granting leave to remain outside the Rules, is it necessary for Article 8 purposes to go on to consider whether there are "compelling circumstances not sufficiently recognised under the Rules". On the facts of this appeal, the case is being advanced on the basis of his relationship with the children (the judge having found that he could not satisfy the partner route) and therefore the Immigration Rules as they stand have specific provisions to deal with limited leave as the parent of a child. It is therefore important as the cases demonstrate that a careful analysis is made by considering the requirement of the Rules. Whilst Mr Cole submits the judge did allow the appeal under the Rules by reason of his conclusion at [28], that cannot be right. If he had done so, he would not have gone on to consider Article 8 "outside the Rules" or in the judge's terminology "in the light of the case law generally as to Article 8", as this would have been unnecessary. It is also claimed that there was some confusion when he referred to the Rule as E-LTR2.3 rather than E-LTRPT2.2 which contains the eligibility route for limited leave to remain as a parent, and made no reference to the other relevant paragraphs of the Rule including EX1.
21. However the question is whether the error is material, in the sense that does it contain an error of law justifying the Upper Tribunal to set it aside? In this context, Mr Cole submits that on the findings of the judge and properly applying the Immigration Rules, the Appellant would have succeeded under the Rules and the decision under Article 8 and the Immigration Rules effectively would be the same.
22. This of course relies on the findings of fact being properly made. The Secretary of State's grounds at (5) appear to make a "reasons challenge" where it is asserted that the judge failed to provide adequate reasons as to why it was accepted the Appellant had a genuine relationship with his children. Mr Diwnycz in his submissions did not rely heavily on paragraph 5 of the grounds. In any event, having considered the findings of fact which I have set out earlier, I do not consider that that ground is made out. The judge had the opportunity to hear the oral evidence of the Appellant and for this to be the subject of cross-examination. He had the advantage also of considering that evidence in the light of the substantial history and the documentary evidence provided before him. Contrary to the assertion in the grounds, the findings of fact set out earlier in the determination demonstrate that the judge made careful findings of fact and credibility. It cannot be said that all the findings were in favour of the Appellant. Indeed, some findings were positively adverse to him. This in my judgment demonstrates that the judge gave careful consideration to the

evidence before him and gave adequate and sustainable evidenced based reasons for reaching the conclusions that he did on the evidence before him. Whilst it could be said that he had reached generous conclusions relating to the children, it could be said that it falls in the category referred to by Carnwath LJ in **Mukarkar v SSHD [2006] EWCA Civ 1045** because such an assessment concerning Article 8 rights is such that different Tribunals, without illegality or irrationality, may reach different conclusions on the same case and the mere fact that one Tribunal has reached what may seem to another as an unduly generous view of the facts does not mean that it has made an error of law. Furthermore I remind myself of the guidance in **MA (Somalia) v SSHD [2010] UKSC 49** at [43] referring to **AH (Sudan)** as to reasoning and having done so I am satisfied that the judge did give adequate reasons for reaching the view that he did. Consequently I am satisfied that the findings of fact made, both adverse and positive, were properly made by the judge on the evidence.

23. Therefore it is necessary to apply those findings of fact to the relevant Rules. The material provisions of Appendix FM are R-LTRPT and contain the requirements for limited leave as a parent. The decision letter makes it plain that it was accepted by the Secretary of State that he met the suitability requirements of the Rules (see paragraph 10 of the decision).
24. E-LTRPT2.2 contains the eligibility requirements for limited leave to remain as a parent. The child must be under 18, living in the UK as a British citizen or settled in the UK, or to have lived continuously for at least seven years immediately preceding the date of the application and therefore to qualify for limited leave as a parent all requirements of E-LTRPT2.2-2.5 must be met. On the facts found by the judge, E-LTRPT2.2 is met, as the relevant children are under 18, living in the UK and are British citizens. As to E-LTRPT2.3 either (a) or (b) has to be met. In this case, the Appellant fell for consideration under (b):-

“(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; or
- (ii) not the partner of the applicant; and
- (iii) the applicant must not be eligible to apply for leave to remain as a partner under this Appendix.”

The facts demonstrate that the parent with whom the child normally lived with, namely K, was a British citizen and on the findings made by the judge was not the partner of the applicant as it was found there was no subsisting relationship and thus (iii) also was satisfied, that the applicant was not eligible to apply for leave to remain as a partner. As to E-LTRPT2.4(a) the applicant must provide evidence that they have (i) sole parental responsibility for the child or that the child normally lives with them or (ii) access rights to the child. In this case on the facts found by the judge the applicant met E-LTRPT2.4(a)(ii). There was some discussion by the advocates as to what constituted “access rights to the child” and Mr

Diwnycz did not demur from Mr Cole's submission that that in effect was met by the judge's findings that the children had a significant degree of face-to-face contact with the father and thus it was not necessary for there to be any order of the court. It is also plain that E-LTRPT2.4(a)(ii) has the word "and" and therefore (b) the Appellant must provide evidence that they are "taking and intend to continue to take, an active role in the child's upbringing".

On the basis of the findings of fact by the judge which I have set out earlier, the judge found that whilst he did not live with the children there was significant face-to-face contact between them. Whilst the judge did not accept that he assisted the children as to their travel to and from school to the extent that he said, he found a degree of plausibility and consistency that he did make some assistance in this regard [27] and at [28] that he had an active role in the children's upbringing and that whilst the parental responsibility was largely that of his wife, he had a degree of parental responsibility and [30] he had contact and assisted them to an extent on a relatively regular basis. The judge also took into account their best interests and they were set out at [30] and [31]. The judge found that they were maintaining a relationship with the Appellant which was currently ongoing and that was firmly expressed in the nature of the letters that were set out before the Tribunal at pages 15, 16 and 17. He found that the removal of the Appellant would seriously affect the emotional wellbeing of the children if the role that he played with the children was to be disrupted. In those circumstances, on the findings of the judge paragraph 2.4 was met. As to the immigration status requirements at LTRP2.3.1 the applicant must not be in the UK as a visitor, with valid leave granted for a period of six months or less (unless the leave was granted pending the outcome of family court or divorce proceedings) or on temporary admission or release unless paragraph EX1 applies. The same is said for the financial requirements at E-LTRPT4.1. As Mr Cole submitted, EX1 applies (a) if the applicant has a genuine and subsisting parental relationship with the child and (ii) it would not be reasonable to expect the child to leave the UK. On the findings of the judge, which I am satisfied were properly reached on the evidence before him, he did find that the Appellant had a genuine and subsisting parental relationship with the children for the reasons that he gave and also that it would not be reasonable to expect those children to leave the UK for the reasons that he amply gave at [31]. Therefore in those circumstances, I accept the submission made by Mr Cole that the Appellant met the Rules for limited leave as a parent based on the findings of fact that were made by the judge and in those circumstances, whilst the judge did not set out the law with any clarity, it has not been demonstrated by the Secretary of State that that error was material for the reasons set out and therefore have not demonstrated that the Tribunal should set aside the determination for error of law.

Decision

The determination of the First-tier Tribunal is not set aside and therefore the decision stands.

Signed

Date

Upper Tribunal Judge Reeds