Upper Tier Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/00110/2014

THE IMMIGRATION ACTS

Heard at Manchester	**Determination Promulgated**
On 13 January 2015	**On 27 January 2015**

Before

Deputy Upper Tribunal Judge Pickup

Between

Khurram Shehzad
[No anonymity direction made]

Appellant

and

Secretary of State for the Home Department

Respondent

Representation:
For the appellant: Mr C Timson, instructed by Platt Halpern Solicitors
For the respondent: Ms C Johnstone, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant, Khurram Shehzad, date of birth 17.8.84, is a citizen of Pakistan.

2. This is his appeal against the determination of First-tier Tribunal Judge Simpson promulgated 16.9.14, dismissing his appeal against the decision of the secretary of State, dated 2.12.13, to refuse his application made on 24.9.12 to extend his discretionary leave to remain in the UK and to remove him from the UK by way of directions under section 47 of the Immigration Asylum and Nationality Act 2006. The Judge heard the appeal on 24.6.14.

3. First-tier Tribunal Judge Cox granted permission to appeal on 29.10.14.

4. Thus the matter came before me on 13.1.15 as an appeal in the Upper Tribunal.

Error of Law

5. In the first instance I have to determine whether or not there was an error of law in the making of the decision of the First-tier Tribunal such that the determination of Judge Simpson should be set aside.

6. The relevant background can be summarised as follows. The appellant first came to the UK with leave as a spouse in 2005. In 2008 his application to extend leave to remain was refused, as his marriage was no longer subsisting. However, he was granted discretionary leave to remain until 1.10.12 on the basis of being the parent of a British citizen child in respect of whom he was to commence access rights.

7. The chronology set out at §2 of the decision of the First-tier Tribunal discloses that over a period of 2 years and 10 months prior to the application the subject of this appeal he spent 367 days in Pakistan. The respondent concluded that he had failed to such sufficient developments in his case for access rights so as to warrant a further grant of leave. The latest documentation provided, dated 6.8.13, showed that he was to have indirect contact with his son, via post, with a letter sent once every three weeks. Although a case review was set for 28.1.14, there was no indication that contact was likely to be increased. The appellant need not remain in the UK to continue such contact as he was permitted.

8. As the appellant did not have access rights to his child and did not provide evidence that he was taking and intended to continue to take an active role in the child's upbringing, he failed to meet the eligibility requirements of Appendix FM. Neither did he meet 2876ADE in respect of private life.

9. At the hearing before Judge Simpson the appellant stated that at the last family hearing on 10.6.14, a new CAFCASS report was commissioned because his wife reported that their child no longer wished to see the appellant. A new hearing date was fixed for September 2014, some 3 months after the hearing before the First-tier Tribunal.

10. Between §7 and §10 the judge set out the appellant's case and evidence. The judge concluded at §13 that the appellant had only limited contact rights with his child and thus that there was nothing to show that he was taking and intending to continue to take an active role in the child's upbringing and thus failed to meet LTRPT 2.4. At §14 the judge found that the appellant could exercise his indirect contact from anywhere in the world and did not need to be in the UK to do so, thus dismissing the appeal on all grounds.

11. In granting permission to appeal Judge Cox found arguable merit in the grounds. "Given that the judge was aware of ongoing proceedings for contact with the appellant's child, that a new CAFCASS report was in preparation, that a further hearing date had been fixed for September (she heard the appeal on 24th June) and that the appellant already had an order for indirect contact, it is arguable that she materially erred in pre-empting, in effect, the decision of the FPC and dismissing the appeal outright on the basis that the unrepresented appellant had not satisfied her

that he met the requirements of E-LTRPT 2.4. The grounds disclose an arguable material error of law in the determination and permission is granted."

12. For the reasons set out herein, I disagree with Judge Cox and find that there was no material error of law in the decision of the First-tier Tribunal.

13. Appendix FM provides a route for leave to remain in the circumstances of a parent exercising access to a British citizen child. Whilst the appellant had access rights, at the date of the appeal hearing they had been limited to indirect contact by letter. In the circumstances, the appellant could not demonstrate as is required in E-LTRPT 2.4 that he is taking and intends to continue to take an active role in the child's upbringing. Despite the appellant's intentions and the then pending further proceedings, the evidence before the judge was to the contrary. The appellant was not and could not properly be described as taking an active role in the child's upbringing. At the date of the appeal hearing, the indications were that the further proceedings were instigated by the appellant's former wife on the basis that the child did not want to see the appellant at all. In other words, the consideration was not as to whether access or contact should be increased but whether it should be terminated. In this regard, Judge Simpson noted that there had been allegations of raped against the ex-wife and of assault on the child, neither of which had progressed to a prosecution. The judge had also noted the lengthy period of time the appellant had spent outside the UK.

14. The Rule 24 response to the appeal, dated 14.11.14, submits that it was clear that at the date of the First-tier Tribunal appeal hearing the appellant did not meet the relevant immigration rules relating to contact. No application was made to adjourn the hearing and it cannot thus be said to have been an error for the judge to determine the matter of the facts as they pertained at the date of the hearing.

15. Mr Timson took a preliminary point that under the transitional arrangements and UKBA Guidance chapter 8, an application to extend discretionary leave would be considered under that policy, provided that the circumstances have not changed. It follows, he submitted, that the judge was in error to consider the matter under Appendix FM. However, that was neither pleaded in the grounds of appeal to the First-tier Tribunal nor in the the grounds of application for permission to appeal and there had been no application to amend the grounds of appeal. Mr Timson suggested that it was a *Robinson* obvious point, and should have been considered by the judge even though not pleaded.

16. I disagree with Mr Timson's submissions. It was not an obvious point and neither having been pleaded nor raised in argument before the First-tier Tribunal, nor addressed in any skeleton argument, I declined leave to add it as a ground of appeal at this stage. I also note in passing that that the guidance Mr Timson relied on is dated November 2014, after the date of the First-tier Tribunal appeal hearing. He was unable to produce to me any relevant guidance in force at the date of the hearing before Judge Simpson.

17. In any event, the transitional arrangements provided, "Applicants who were granted leave under the Discretionary Leave policy before 9 July 2012 will continue to be considered under that policy through to settlement, provided they continue to

qualify for leave and their circumstances have not changed." The appellant's circumstances had very clearly changed since the grant of discretionary leave, his access rights had been reduced by order of the court on 6.8.13 to indirect contact by letter. His discretionary leave had been granted on the basis that he was pursuing access rights through the courts; those proceedings had resolved against him. The only further proceedings were instituted not by him but by his wife to terminate all contact. In the circumstances, there were very significant changes in circumstances and there is no merit in the argument that the judge was in error in considering the matter under Appendix FM, as did the Secretary of State in the refusal decision.

18. Mr Timson also submitted that the judge should have adjourned the hearing, even though there was no application by the appellant to do so, on the basis of the joint protocol, date 19.7.13. Paragraph 6 of this explains that it is not the role of the judges in either jurisdiction to predict the outcome of the proceedings in the other jurisdictions. "Where the decision in the Family Court is likely to be a weighty consideration in the immigration decision, it is anticipated that it will normally be necessary for the Tribunal to wait until the Family Court judge has reached a decision on the issue relevant to the immigration appeal. If so, either appeal will be allowed by the Tribunal in anticipation of a short period of leave being granted or the hearing will be adjourned, depending on the anticipated timescale of the family proceedings."

19. In Mohammed (Family Court proceedings – outcome) [2014] UKUT 00419 (IAC), the Upper Tribunal panel held that whilst there was always the possibility of a parent making a fresh application relating to contact, there is nothing in guidance approved by the Court of Appeal that supports the notion that the mere possibility of such an application being made or pursued is a relevant criterion in the case of an immigration appeal when deciding whether to adjourn an appeal or to direct a grant of discretionary leave in order for such proceedings to be pursued. "The guidance is concerned with whether there is a realistic prospect of the Family Court making a decision that will have a material impact on the relationship between a child and the parent facing immigration measures such as deportation."

20. In that case the Tribunal considered it significant that the appellant in that case had been granted only indirect contact via letters and video link. "There was nothing to show that the order for indirect contact was qualified by any suggestion that it might be changed to direct contact. In short, the documentary evidence before the First-tier Tribunal established that the Family Court has reached a concluded view as to the best interests of the child which identified them as entailing no direct contact with the appellant. Whilst the appellant sought in evidence to claim that the Family Court left open that the appellant could become more directly involved in K's life, he had simply failed to substantiate that claim. That claim was at best an explanation of his own aspiration." It was also pointed out that the burden of proof was on the appellant. The Upper Tribunal found that it was entirely proportionate for the First-tier Tribunal panel to consider that the appellant's removal would not prevent him from maintaining from abroad an indirect contact of a similar kind that he had been granted in the UK.

21. The grounds of application for permission to appeal complaint that at a hearing on 8.8.14, the Family Court had directed a pre-hearing review for 29.9.14 and final hearings for 8.10.14 and 10.10.14. It is not clear whether this information was provided to Judge Simpson. However, I was told that the matter remains unresolved even now. I am not satisfied that the circumstances of this case fall within the provisions of the protocol set out above. The circumstances of the appellant in Mohammed are not dissimilar to the available evidence before the First-tier Tribunal in the present case. It appears that the pending decision in the Family Court was whether to termination contact altogether, on the basis that the child did not wish to see the appellant. There was no evidence before the First-tier Tribunal, and none before me today, to suggest that there was likely to be any increase in contact between the appellant and his son, or that he had made any application for such, although he made it clear to judge Simpson that he wished to pursue contact with his son. On the evidence available to the First-tier Tribunal, this is not a case where the decision of the First-tier Tribunal was likely to pre-empt the decision of the Family Court. In the circumstances there is no merit in this submission, which was not in any event pleaded in the grounds of application for permission to appeal.

22. In the circumstances, I find no error of law in the decision of Judge Simpson. She assessed the available evidence and reached a conclusion that was open to her on that evidence and for which cogent reasons have been provided. The appellant did not meet the requirements of Appendix FM and there is no basis for considering that any article 8 assessment on the same facts would demonstrate that the decision of the Secretary of State was either unjustifiably harsh or disproportionate to the appellant's article 8 ECHR right to respect for family life. As the judge pointed out, such family life as he had with his child had been assessed and limited by the Family Court and he did not need to be in the UK to exercise the limited degree of contact the Family Court had ordered in the best interests of the child.

Conclusion & Decision:

23. The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law such that the decision should be set aside.

I do not set aside the decision.

The decision of the First-tier Tribunal stands and the appeal remains dismissed.

Signed: Date: 26 January 2015

Deputy Upper Tribunal Judge Pickup

Anonymity

I have considered whether any parties require the protection of any anonymity direction. No submissions were made on the issue. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

Given the circumstances, I make no anonymity order.

Fee Award **Note: this is not part of the determination.**

In the light of my decision, I have considered whether to make a fee award (rule 23A (costs) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 and section 12(4)(a) of the Tribunals, Courts and Enforcement Act 2007).

I have had regard to the Joint Presidential Guidance Note: Fee Awards in Immigration Appeals (December 2011).

I make no fee award.

Reasons: The appeal has been dismissed and thus there can be no fee award.

Signed: Date: 26 January 2015

Deputy Upper Tribunal Judge Pickup