IAC-AH-V1

Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/05347/2019**

THE IMMIGRATION ACTS

Heard at Field House (remotely by MS Teams)	**Decision & Reasons Promulgated**
On Friday 1st October 2021	**On Tuesday 09th November 2021**

Before

UPPER TRIBUNAL JUDGE KAMARA

Between

NADEEM MUGHAL
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms M Malhotra, counsel instructed by MA Consultants
For the Respondent: Ms J Isherwood, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. This is an appeal against the decision of First-tier Tribunal Judge G Richardson, promulgated on 12 March 2021. Permission to appeal was granted by First-tier Tribunal Judge Gumsley on 20 May 2021.

Anonymity

2. No direction has been made previously, and there is no application nor obvious reason for one now.

Background

3. The appellant travelled to the UK as a visitor on several occasions between 1999 and 2009. While visiting the UK in 2007 with his wife and three children, the appellant's wife disappeared with their children and sought asylum owing to being a victim of domestic violence. A fourth child was born in 2008. The appellant returned alone to Pakistan in 2009. Thereafter he made an unsuccessful application for leave to enter the United Kingdom as a Tier 1 (entrepreneur) which was refused on 27 March 2013. The appellant and his wife signed a consent order in November 2013 which permitted the appellant to have direct contact with the children. On 6 December 2018, the appellant applied for leave to enter to have access to a child under Appendix FM. That application was refused on 24 February 2019 and this decision is the subject of this appeal.

4. The Secretary of State refused the application because she was not satisfied that the appellant was taking nor intended to take an active role in the children's upbringing, she was not satisfied that adequate accommodation was available and concluded that there were no exceptional circumstances leading to any unjustifiably harsh consequences.

5. The appellant appealed. On 31 October 2019, an Entry Clearance Manager reviewed the decision under appeal, noting that the appellant had chosen not to submit any evidence to support his claim that he had met his children in various countries outside the UK and that there remained insufficient evidence of contact with or support of the children as well as evidence of adequate accommodation. The initial decision to refuse entry was maintained in full.

The decision of the First-tier Tribunal

6. The hearing before the First-tier Tribunal took place over video link. Owing to connection difficulties, the hearing proceeded without the appellant's involvement, albeit he was able to listen in via his telephone. The appellant's eldest child, Y, aged 19 gave telephone evidence and a family friend, Mr Khan, appeared over video link. The judge was informed that the appellant and his wife had reconciled in Pakistan during 2020 and were expecting another child. The respondent's representative argued that this amounted to a material change and the application for entry now fell to be refused under E-ECPT.2.3(b)(ii) because the other parent of the

children was now the appellant's partner. The judge considered the circumstances at the time of the ECO's decision, at the invitation of the appellant's counsel and concluded that the appellant was previously unable to meet the requirements of the Rules owing to the absence of evidence going to adequate accommodation and that remained the case. Alternatively, if the case was considered on the current circumstances, the appellant failed to meet the eligibility requirements of the Rules.

7. The judge further found there to be no exceptional circumstances which would lead to unjustifiably harsh consequences for the appellant or his family.

The grounds of appeal

8. In the grounds of appeal, it was argued that the judge contradicted himself regarding the evidence of adequate accommodation and without this error the appellant would have qualified for entry clearance to join his children. Alternatively, it was contended that the judge erred in his proportionality assessment which did not include reference to the appellant's wife and the child they were expecting nor the circumstances and views of the three minor children who were in full-time education in the United Kingdom.

9. Permission to appeal was granted on the basis sought, with the judge granting permission that Judge Gumsley was deserving of sympathy given the "*shifting nature of the appellant's case, and the different submissions made as to the approach the judge should take, them being put in the alternative.*"

10. The respondent's Rule 24 response, received on 6 August 2021, stated that the appeal was opposed. It was argued that the judge reached clear and sustainable findings that the Rules were not met either at the time of the application or the hearing. Failure to meet the Rules was a matter weighing against the appellant in the Article 8 balancing exercise and the judge was entitled to conclude that the decision did no more than maintain the status quo.

The hearing

11. Ms Malhotra explained that the grounds had been settled by her colleague, who represented the appellant before the First-tier Tribunal. She made the following points. The judge rightly made his assessment with reference to the date of the hearing but appeared confused by the ambiguity in respect of the appellant's relationship with his wife. Regarding the first ground, the judge accepted the evidence from the family friend [22] and therefore should have accepted that there was adequate maintenance and accommodation for the appellant. The judge was distracted by the uncertainty of the appellant's employment position and where he wished to reside, but this should not have been fatal to the outcome of the appeal. As for the second ground, at [28] the judge made

powerful findings as to the closeness of the family, with reference to the order from the Family Court but did not consider proportionality at all. MM Lebanon [91] set out highly prescriptive factors which could only be alleviated by the presence of the appellant in the United Kingdom. In answer to my query, Ms Malhotra was not able to identify any unjustifiably harsh consequences brought about by the respondent's decision, albeit she submitted that the appellant's wife could not visit Pakistan owing to threats from family members. I pointed out that the appellant, his wife and their children were together in Pakistan as recently as 2020 and this, according to his witness statement, was where the expected child was conceived. Ms Malhotra argued that the judge had not adequately explained his proportionality decision.

12. Ms Isherwood began by making the point that the appellant's representative was content for the appeal to proceed without him giving evidence. The following points were also made. While the judge accepted the evidence of the witnesses regarding accommodation and contact, maintenance became a live issue during the hearing [24] and [27]. At [28] the judge considered the best interests of the children and gave weight to evidence of contact at [29]. There was nothing in the appellant's witness statement regarding undue harshness of the decision. The judge did not know where the appellant would live, the status of the relationship, his employment position, how he would support himself or how much time he would spend in the UK. The appellant enjoyed regular contact with the children outside the UK and the judge reached findings which were open to him.

13. In response, Ms Malhotra accepted that the appellant's ability to meet the Rules was muddied by what was raised at the hearing about his reconciliation with his wife. The respondent had not challenged maintenance and there was evidence of the appellant's ability to meet the financial requirement before the judge who had said nothing about this evidence. The appellant had a loving, continuous relationship with his children but owing to his change of status with their mother, he did not meet the requirements of the Rules. The judge had a duty to explain why he thinks it was proportionate to interfere with family life in this case. The appellant went to the expense of seeing his children around the world and he should be with them.

14. At the end of the hearing, I upheld the decision of the First-tier Tribunal. I provide my reasons below.

Decision on error of law

15. The first ground takes issue with the judge's apparent acceptance of the evidence of the appellant's sponsor while, at the same time finding that the appellant was unable to meet the maintenance and accommodation provision of the Rules. The evidence of the appellant's sponsor, Mr Khan, which was accepted by the judge, related to a different issue entirely, that of whether the appellant was taking and intended to continue to take an

active role in the children's upbringing [21-23]. The judge's findings regarding maintenance and accommodation were separately considered at [24-27]. It was the appellant's case that he would reside with Mr Khan and the latter's family. The judge was correct to consider that the aforementioned claim had been thrown into doubt by the reconciliation between the appellant and his wife. The judge was further entitled to find that putting aside the appellant's reconciliation with his wife, there was insufficient evidence that the appellant would be able to maintain and accommodate himself owing the absence of current evidence of the appellant's finances, income or business nor explanation of how that business would continue if the appellant lived in the UK. Over 500 pages of evidence was contained in the appellant's bundle. While the telephone records were dated 2020, by contrast the most recent bank statement dated from November 2018. Otherwise, there was a letter dating from December 2018 from Alziam Trading in UAE which claimed that the appellant is a partner in that company.

16. Simply put, the judge was considering the appellant's financial circumstances as at the date of the hearing and was correct to note a complete absence of evidence as to those circumstances. There was also no satisfactory evidence of the nature of the accommodation on offer in Reading from Mr Khan. In the visa application form, the offer of accommodation came from a different source, a Mr Waseem Rehman who was also the appellant's business partner in Alziam Trading. That accommodation, in Hayes, was already occupied by 4 adults and 2 children. The offer from Mr Khan was confirmed in his unsigned witness statement in the first appellant's bundle but no details were provided regarding all the other occupants of the property nor how long the offer was available. At [27] the judge described the consideration of maintenance and accommodation a "false exercise." He was right to do so. Even had the judge erred on maintenance and accommodation, this would not have been a material error given the appellant had reconciled with his wife at the time of the hearing. Regrettably, for the appellant, this meant that he could not meet the requirements of E-ECPT.2.3(b)(ii), in that the other parent of his children should "not be the partner of the applicant." The judge made no error in finding that the appellant was unable to meet the requirements of the Rules either at the time of the decision or the hearing and that this was the starting point for his Article 8 assessment.

17. The second ground is little more than a disagreement with the judge's proportionality assessment. Contrary to what was argued on the appellant's behalf, the judge carefully considered the evidence and submissions made between [28-32] and arrived at an adequate proportionality decision. The judge considered all matters favourable to the appellant including that there was a Court order, the best interests of the children would be served by having contact with their father, that the contact between the appellant and his children seemed positive, that he provided support to his children and wished to have more contact and involvement.

18. The judge directed himself appropriately and rightly focused his mind on the existence or otherwise of exceptional circumstances which would lead to unjustifiably harsh consequences for the appellant, his wife or their children [30]. None were identified in the material before the judge, in argument or even before me. The judge provided sustainable reasons for concluding that the refusal of the appellant's entry clearance application did not amount to a breach of Article 8. Those reasons included that it was unknown to what extent he would increase his involvement with the children, it was unknown where he would live (either in Hayes with his wife or Reading with Mr Khan), the judge was told that the appellant's relationship with his wife was volatile and the reconciliation might not last, the appellant's employment position was unclear in that he worked abroad and it was unclear as to what periods of time he would be residing in the United Kingdom. The judge noted that the appellant had regular indirect and direct contact and involvement with his children despite being outside the United Kingdom and that there was an absence of exceptional circumstances. I can find no error in the approach of the judge, let alone a material error.

Decision

The making of the decision of the First-tier Tribunal did not involve the making of an error of on a point of law.

The decision of the First-tier Tribunal is upheld.

No anonymity direction is made.

Signed: **Date 4 October 2021**
Upper Tribunal Judge Kamara

NOTIFICATION OF APPEAL RIGHTS

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be **received** by the Upper Tribunal within the **appropriate period** after this decision was **sent** to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent:

2. Where the person who appealed to the First-tier Tribunal is **in the United Kingdom** at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is **12 working days (10 working days, if the notice of decision is sent electronically).**

3. Where the person making the application is in detention under the Immigration Acts**, the appropriate period is 7 working days (5 working days, if the notice of decision is sent electronically)**.

4. Where the person who appealed to the First-tier Tribunal is **outside the United Kingdom** at the time that the application for permission to appeal is made, the appropriate period is **38 days (10 working days, if the notice of decision is sent electronically).**

5. A "working day" means any day except a Saturday or a Sunday, Christmas Day, Good Friday or a bank holiday.

6. The date when the decision is "sent' is that appearing on the covering letter or covering email