IAC-FH-AR-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/49545/2013

THE IMMIGRATION ACTS

Heard at Field House	**Oral Decision & Reasons Promulgated**
On 11 March 2015	**On 16 March 2015**

Before

UPPER TRIBUNAL JUDGE JORDAN

Between

KASHIF IQBAL QURESHI
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr M Karnik, Counsel, instructed by M A Consultants
For the Respondent: Mr I Jarvis, Home Office Presenting Officer

DECISION AND REASONS

1. By a decision that I made dated 13 November 2014 I found that there was a material error of law in the determination of Designated Judge McClure in relation to an application made on 10 October 2012. Accordingly I am remaking the decision. The appellant is a national of Pakistan who arrived lawfully in the United Kingdom in March 2008 as a visitor and in August 2010, at which time his last leave expired, he

remained. On 24 April 2011 he married a British citizen and the couple started cohabiting on 28 January 2012 and they have two British children. On 12 October 2012 the appellant made an application for leave to remain which was refused on 4 October 2013 and a removal decision was made. The appeal against that decision was the appeal which was determined by Designated Judge McClure.

2. It is common ground that the legal regime that I have to consider is the legal regime that applies on 4 October 2013, that is the date of the respondent's decision, and it requires me to look at the Rules then in force. For the purposes of this judgment I am not going to set out the requirements of the Rules although I will insert those Rules into the written determination. Suffice it to say that the requirements were under two routes: the routes either as a partner or as a parent.

3. The route as a partner required the applicant to be married to his spouse or in a relationship set out in GEN 1.2:

> GEN.1.2. For the purposes of this Appendix "partner" means-
>
> (i) the applicant's spouse;
>
> (ii) the applicant's civil partner;
>
> (iii) the applicant's fiancé(e) or proposed civil partner; or
>
> (iv) a person who has been living together with the applicant in a relationship akin to a marriage or civil partnership for at least two years prior to the date of application,
>
> unless the context otherwise requires.

4. The appellant went through a form of marriage which was not recognised in English law and no attempt has been made to obtain the status of a spouse by undergoing a civil ceremony of marriage which would have recognised both in law and in religious terms the fact that the couple are married. This has a significant bearing upon the application because for the purposes of the partner route the appellant has to establish the requirements of GEN 1.2. Those are that he is either a spouse according to law or a civil partner, which does not apply in these circumstances, or a fiancé or proposed civil partner or has been living together with the appellant in a relationship akin to marriage for at least two years prior to the date of application.

5. Whilst the precise words have varied between the version of the Rules on 4 October 2013 and the Rules on 11 March 2015, which was the date of the hearing before the Designated Judge, the substance of that requirement has remained the same and the appellant did not meet that requirement because he had not been living with the appellant for the period of two years prior to the date of application.

6. There is in my judgement nothing unlawful in the Secretary of State or Parliament when dealing with a relationship which falls short of a recognised marriage or civil partnership making the existence of that relationship dependent upon a period of cohabitation as a mark of establishing the permanence of that relationship so that it has an equivalent status in its being an established relationship.

7. The appellant does not meet that requirement and accordingly he cannot succeed under the partner route.

8. The second route is as a parent. There is no doubt that the appellant is a parent but in order to meet the requirements of the Rules for limited or indefinite leave to remain the appellant must not fall for refusal under Section S-LTR which is the suitability of leave to remain and he must meet the requirements of Section E-LTRPT eligibility for leave to remain as a parent. These requirements are subject to the additional requirements of E-LTRPT2.2 to 2.4 and E-ELTRPT3.1. Finally there is the application of EX1.

9. The requirements are:

Section R-LTRPT: Requirements for limited leave to remain as a parent

R-LTRPT.1.1. The requirements to be met for limited or indefinite leave to remain as a parent or partner are-

(a) the applicant and the child must be in the UK;

(b) the applicant must have made a valid application for limited or indefinite leave to remain as a parent or partner; and either

(c) (i) the applicant must not fall for refusal under Section S-LTR: Suitability leave to remain; and

(ii) the applicant meets all of the requirements of Section ELTRPT: Eligibility for leave to remain as a parent, or

(d) (i) the applicant must not fall for refusal under S-LTR:

(ii) the applicant meets the requirements of paragraphs E-LTRPT.2.2-2.4. and E-LTRPT.3.1.; and

(iii) paragraph EX.1. applies.

Section E-LTRPT: Eligibility for limited leave to remain as a parent

E-LTRPT.1.1. To qualify for limited leave to remain as a parent all of the requirements of paragraphs E-LTRPT.2.2. to 5.2. must be met.

Relationship requirements

E-LTRPT.2.2. The child of the applicant must be-

(a) under the age of 18 years at the date of application, or where the child has turned 18 years of age since the applicant was first granted entry clearance or leave to remain as a parent under this Appendix, must not have formed an independent family unit or be leading an independent life;

(b) living in the UK; and

(c) a British Citizen or settled in the UK; or

(d) has lived in the UK continuously for at least the 7 years immediately preceding the date of application and paragraph EX.1. applies.

E-LTRPT.2.3. Either-

(a) the applicant must have sole parental responsibility for the child or the child normally lives with the applicant and not their other parent (who is a British Citizen or settled in the UK); or

(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;

(ii) not the partner of the applicant (which here includes a person who has been in a relationship with the applicant for less than two years prior to the date of application); and

(iii) the applicant must not be eligible to apply for leave to remain as a partner under this Appendix.

E-LTRPT.2.4.

(a) The applicant must provide evidence that they have either-

(i) sole parental responsibility for the child, or that the child normally lives with them; or

(ii) access rights to the child; and

(b) The applicant must provide evidence that they are taking, and intend to continue to take, an active role in the child's upbringing.

Section EX: Exception

EX.1. This paragraph applies if

(a)

(i) the applicant has a genuine and subsisting parental relationship with a child who-

(aa) is under the age of 18 years, or was under the age of 18 years when the applicant was first granted leave on the basis that this paragraph applied;

(bb) is in the UK;

(cc) is a British Citizen or has lived in the UK continuously for at least the 7 years immediately preceding the date of application; and

(ii) it would not be reasonable to expect the child to leave the UK; or

(b) the applicant has a genuine and subsisting relationship with a partner who is in the UK and is a British Citizen, settled in the UK or in the UK with refugee leave or humanitarian protection, and there are insurmountable obstacles to family life with that partner continuing outside of the UK.

10. The appellant fails to meet the requirements as a result of the relationship which he has with his 'wife'. He falls foul of the requirements of 2.3 because he has been in a relationship for less than two years at the date of application.

11. The purpose of this requirement is to draw a distinction between the nuclear family where the family are living together as a unit and the circumstances where a parent has sole responsibility for a child or access rights to the child. The distinction

between those two significantly different types of case is to draw a line between a nuclear family and a family which is separated in some form or another.

12. What, however, the Rules do not set out to establish is a route where the parent is living in a relationship, short of marriage, where that relationship has lasted for less than two years prior to the date of application.

13. The requirements of EX1 do not require any separate consideration.

14. The point made by Mr Karnik is that the Rules are either flawed or that the circumstances in which the appellant finds himself should be treated as such that an exception should be made to the Immigration Rules because they do not properly reflect the rights of a father who is in a subsisting relationship with his 'common law' wife (if I can say that) and their children. What he submits is that from the commencement of the child's birth there is a relationship between the child and his father which should not be subject to any limitation where the couple are not married; a requirement to have been living together for a period of two years prior to the date of application is an unlawful bar to the exercise of that right.

15. In this way he says either the Rules are unlawful or an exception should be made because of this lacuna. In my judgement this is not a lacuna. It is a careful construction of a policy which distinguishes between a nuclear family which is either together because of the bond of marriage or civil partnership or the bond which is implied by a relationship which has lasted for more than two years and the situation where the relationship has either never taken the form of a nuclear family and one parent is looking after the relevant child or there is a parent who has the benefit of access rights to the child. It cannot be said that the construction of the Rules is such as to render them unlawful by reason of the distinction that is drawn between these various categories or that, by reason of the appellant not being provided with the benefit that he seeks to obtain, an exception should be made in his case because the Rules do not provide it. It is true that he does not meet the requirements of the Rules but that is a far cry from saying that the Rules require an exception to be made in his case. He does not meet the Rules and there are no exceptional circumstances.

16. Having a child of a British parent or having a child who is a British citizen does not for that reason alone create a right to remain in the United Kingdom for the benefit of a non-national parent.

17. In those circumstances I am satisfied that the requirements of the Immigration Rules are not met and the appeal fell to be refused for that reason alone.

18. It is as well to consider the requirements of sections 117A-D inserted into the Nationality, Immigration and Asylum Act, 2002 and whether or not there is a place for a consideration outside the Rules. The considerations set out in s.117B do not materially alter the position in favour of the appellant. The operation of the Rules has been recently considered by the Court of Appeal in *Singh and Khalid v SSHD* [2015] EWCA Civ 74 (12 February 2015). It is not necessary to pursue this, save to

say that the agreement reached by the parties as to the applicable Rules is in accordance with the view expressed by the Court of Appeal.

19. The appellant does not meet the requirements of the Immigration Rules for the reasons that I have stated and even in the broadest view of those Rules there is no reason why a departure should be made in his case or indeed in the case of the children.

20. Whilst the child's best interests are a factor which to be taken into account, in the circumstances of this case there is a route which is available to the appellant. Indeed it may even be a route which he has already pursued. That does not in my judgement mean that the decision, the subject of this appeal, was an unlawful one or fails properly to afford due for either his wife's or his children's rights under the Human Rights Convention and for these reasons I dismiss the appeal.

Notice of Decision

The First-tier Tribunal Judge made an error on a point of law. I substitute a decision to the same effect: the appeal is dismissed under the Immigration Rules.

No anonymity direction is made.

ANDREW JORDAN
JUDGE OF THE UPPER TRIBUNAL

I have dismissed the appeal and therefore there can be no fee award.

ANDREW JORDAN
JUDGE OF THE UPPER TRIBUNAL