IAC-AH-KEW-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/53588/2013

THE IMMIGRATION ACTS

Heard at Centre City Tower, Birmingham	**Decision & Reasons Promulgated**
On 30th September 2015	**On 12th October 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE FRENCH

Between

SUBHANULLAH AMARKHIL
(ANONYMITY ORDER NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr S Vokes, instructed by Messrs J R Jones
For the Respondent: Mr N Smart, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The initial hearing of this appeal in the Upper Tribunal took place before me on 26th August 2015. My decision following that hearing was that there was a material error of law in the decision of the judge at first instance. That initial decision was dated 2nd September 2015 and promulgated on 4th September 2015. It is annexed to and incorporated into this decision. The background to the appeal is set out in that document and there will be no useful purpose in repeating it.

2. At the resumed hearing before me Mr Vokes confirmed that he and Mr Smart were agreed that the appeal could be decided without further oral evidence, on the basis of the established facts. Mr Smart said that the facts were that the Appellant and his step-mother (who was to be regarded as his mother by virtue of paragraph 6 of the Immigration Rules) had entered for settlement with one or more other children. The mother had applied for indefinite leave to remain but had failed simply because she could not meet the language requirement and she was therefore given a further 30 months' leave. Thereby she fell out of the five year route to settlement and into the ten year route. At least one other child had been granted leave in line with the mother. Considerations under paragraph 298(i)(a) of the Rules could not be satisfied as the mother was not settled and was in the limited leave area. With regard to sub-paragraph (b) although the Appellant's natural mother had died shortly after his birth his step-mother was alive. With regard to sub-paragraph (c) it was not asserted that the father had undertaken sole responsibility for his upbringing. He accepted that the Appellant might qualify under sub-paragraph (d) which reads:

> "One parent or a relative is present and settled in the United Kingdom and there are serious and compelling family or other considerations which make exclusion of the child undesirable and suitable arrangements have been made for the child's care ..."

3. Mr Smart said the issue of the Appellant being over the age of 18 had already been dealt with and was not a bar to his succeeding. Further as to sub-paragraph (d) of paragraph 298(i) the Appellant was a member of a family unit and the evidence was that shortly following his mother's death his father had remarried. There was no dispute that even though he was over 18 there was family life with his parents and siblings. He was aware from Mr Vokes that it was also argued that the Appellant could also rely upon Appendix FM to the Rules.

4. Mr Vokes relied upon his helpful skeleton argument upon which he expanded. Appendix FM had been considered in the refusal letter of 29th November 2013, he said. The Appellant had been granted leave to enter as a dependent child of his father who was a UK citizen settled in this country, although his naturalisation had occurred after the Appellant's birth. It was argued that paragraph E-LTRC1.2 of Appendix FM applied to him which read "the applicant must be under the age of 18 at the date of application or when first granted leave as a child under this route." The applicant had been granted leave to enter with a view to settlement originally as a child.

5. He continued that the Appellant also met the other qualifying requirements in paragraphs E-LTRC1.3 to 1.6 as he was not married or in a civil partnership, he had not formed an independent family unit and he was not leading an independent life; he lived in the family home dependent upon his parents and was a student. With regard to E-LTRC1.6

one of his parents was in the UK with leave to remain; his step-mother and her partner, the Appellant's father, were both parents of the applicant.

6. He continued that by virtue of E-LTRC1.1 the Appellant could meet the requirements referred to in the previous paragraph by virtue of R-LTRC1.1(d)(ii) and that was sufficient. It was also the case that his step-mother, as the Respondent accepted was a "parent". She had last been granted leave to remain on 20th June 2013 when Appendix FM had been in force for some time, presumably under paragraph D-LTRP1.2 of Appendix FM. That appeared to be the case from the document appearing at page 82 of the Appellant's bundle and therefore the requirements of R-LTRC1.1(d)(iii) was met and there was no issue as to suitability under R-LTRC1.1(d)(i). He submitted that the Appellant met the requirements of Appendix FM and the appeal should be allowed on that basis. As to the meaning of the phrase "under this route" he submitted that that meant leave to enter having been granted as a child.

7. In the alternative he said that the Appellant should succeed under paragraph 298(i)(d) and (ii). He had been given leave to enter presumably under paragraph 302 and if it had not been shown that he met the test for knowledge of the English language and life in the United Kingdom under 298(vii) he would be entitled to limited leave under paragraph 298A. With regard to "serious and compelling family or other considerations", as referred to in paragraph 298(i)(d), the Appellant did not have an independent existence outside of his family, his whole family lived in the UK, he had no present link to Afghanistan which was in the throes of a civil war and he had been admitted with an expectation of settlement as a child. The Rules as set out were in line with dependent family members over the age of 18 as set out in **Ghising (Family Life – Adults – Gurkha Policy) [2012] UKUT 00160 (IAC)**. It was to be noted that the current policy under paragraph FM included no restrictive clause with regard to "serious and compelling family or other considerations." As was well-established family life had to be considered in the round and bearing in mind the rights of other members of the family.

8. Finally Mr Smart commented that it appeared from the beginning of the section on family life as a child of a person with limited leave as a partner or parent in Appendix FM that the matter could be decided either under Appendix FM or under part 8 of the Rules. Mr Vokes said that the Appellant's step-mother was applying for further leave and therefore the Appellant came within this route.

9. Having considered those detailed arguments I found Mr Vokes' primary contention to be persuasive.

10. Although the Appellant's application had been completed on the form seeking indefinite leave to remain Appendix FM is expressed to apply to applications for leave, not merely for limited leave. The Appellant had been granted entry clearance as a child at a time before Appendix FM was introduced and I could see no reason why the generic form of entry as a

child should not be regarded as coming "within this route." It was the case that in the refusal letter the Secretary of State had considered the various other elements of Appendix FM. Having reached that view the other elements of Mr Vokes' argument fall into place. The Appellant was under the age of 18 when first granted leave as a child as required by E-LTRC1.2. He met the qualifying requirements of E-LTRC1.3 to 1.6 and by virtue of R-LTRC1.1(d)(ii) that was sufficient for him to succeed. The Appellant is entitled to a further grant of leave under Appendix FM.

11. With regard to the route under paragraph 298 of the Rules themselves there was no evidence before me that the Appellant had passed the English and life in the United Kingdom test (although as he is at university he almost certainly has the required level of English). Nonetheless even had he met the test of there being serious and compelling family or other considerations making exclusion undesirable in those circumstances he would not have been entitled to indefinite leave to remain. As I have already found that the Appellant succeeds under Appendix FM it is not necessary for me to go on to decide the issue although I note that there is much to be said in the Appellant's favour. He was under the age of 18 at the date of the initial application, his family are here and he continues to have family life with them and he is about to embark on a university course.

Notice of Decision

The appeal is allowed under the Immigration Rules Appendix FM.

No anonymity order was sought and none is made.

Signed Date 07 October 2015

Deputy Upper Tribunal Judge French

TO THE RESPONDENT
FEE AWARD

I have considered whether to make a fee award in favour of the Appellant. However the Appellant succeeded only on the basis of an argument which was not put earlier to the Respondent and in those circumstances I do not consider that a fee award is appropriate and none is made.

Signed Date 07 October 2015

Deputy Upper Tribunal Judge French