Upper Tribunal
(Immigration and Asylum Chamber) Appeal no: **IA 32014-13**

THE IMMIGRATION ACTS

At	**Field House**	Decision signed:	**25.07.2014**
on	**25.07.2014**	sent out:	**30.07.2014**

Before:

Upper Tribunal Judge
John FREEMAN

Between:

Abdul Bosor SUMON

appellant

and

Secretary of State for the Home Department

respondent

Representation:

For the appellant:	Mr Nazharul Karim Mustafa, authorized immigration practitioner, Kalam & Co
For the respondent:	Mrs Rhona Petterson

DETERMINATION AND REASONS

This is an appeal, by the appellant, against the decision of the First-tier Tribunal (Judge Ceridwen Griffith), sitting at Taylor House on 16 April, to dismiss a parent with contact appeal by a citizen of Bangladesh, born 4 April 1985.

2. Very briefly, the facts were as follows: the appellant was here with leave to remain as the husband of a British citizen till 31 October 2011. They had one daughter, N, born 15 September 2007. On 28 October 2011 the appellant applied for further leave to remain, this time on the basis that, though he and his wife were now divorced, he still had contact with N. Later he produced an order for him to have indirect contact with N, by phone calls and cards, made on 22 August 2012.

3. On 11 July 2013 the application was refused, under appendix FM of the 'new Rules', in force from 9 July 2012: the grounds referred to the terms of the contact order. Since the appellant had only an order for indirect contact, he could not reasonably have succeeded at that point under the relevant 'old Rule', paragraph 248A. However in this case nothing turns on the change in the Rules (as to which see *Edgehill & another* [2014] EWCA Civ 402). The reason is that the only ground for refusal under paragraph 248A (apart from the lack of a contact order, which is not in issue) was lack of satisfaction under sub-paragraph (v) that "the child visits or stays with the applicant on a frequent and regular basis and the applicant intends this to continue". This provision no longer appears as a specific requirement in appendix FM E-LTPRT 2.4.

4. The refusal under appendix FM referred also to lack of satisfaction that the appellant was taking, and intended to continue to take an active rôle in N's upbringing. It follows that the relevant rule for present purposes (which appears without relevant difference in both the old and new versions) is this:

> E-LTRPT.2.4.
>
> (a) …
>
> (b) The applicant must provide evidence that they are taking, and intend to continue to take, an active role in the child's upbringing.

5. However, by the date of the first-tier hearing on 16 April, the position had changed: on 20 March 2014 an order was made for the appellant to have direct contact with N, in these terms: "The respondent mother shall make [N] available for contact with the Applicant father at reasonable times by agreement". Clearly this was no more than an order for direct contact in principle, and by agreement: while the judge refers at paragraph 26 to its terms 'described above', I cannot see where she has done so.

6. The judge's main finding of fact on the paragraph 248A refusal appears at paragraph 26: she noted the very recent order for direct contact, and went on:

> However, as far as the appellant taking an active role in the child's upbringing is concerned and his intention to do so, I am not satisfied that there is sufficient evidence available … Since 20 March 2014 there has been one visit and although others are planned and the appellant has expressed an intention to move to be near his daughter, as yet they are no more than plans or aspirations. At present there is no evidence of the child staying with the appellant on a frequent and regular basis as required by the rule.

7. On that basis, the judge found against the appellant, both on the old rule (paragraph 248A (v)) and the new one (E-LTRPT.2.4. (b)). She did so on the basis that

> If as submitted, Appendix FM applies, then I make the same findings in relation to paragraph E-LTRPT.2.4.

8. While the judge went on to deal with the lack of evidence of telephone contact since the order for indirect access in 2012, or of the appellant's being consulted or having made any decisions about N's upbringing, and made further findings under article 8, she also declined to allow the appeal under that head, on the basis that

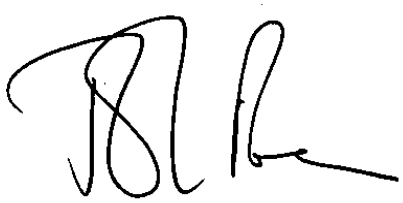
There is insufficient evidence at present for me to be satisfied that there are compelling circumstances in existence here.

9. In my view, what the judge needed to do was first to consider the appeal under the only relevant rule which the appellant was required to satisfy by the date of the decision under appeal, which was E-LTRPT.2.4. (b), without reference to what had been required under paragraph 248A (v). The current rule is expressed in the present tense, directing the decision-maker both to what is happening now, and to the future, so far as it concerns the appellant's intentions; and the direct contact order was very recent, with no set terms.

10. The judge was not helped by the position taken by the presenting officer (not Mrs Pettersen), who argued that the only relevant rule was paragraph 248A; nor by the difficulties posed by the way in which the 'old Rules' have been incorporated into the new ones. It was also not an easy task for the judge to assess both whether the appellant was now taking, and intended in future to take an active role in N's upbringing. However she did need to do so without negative reference to the lack of visiting or staying access in the past, when the appellant had been forbidden it by order of the family court. To that extent, and no further, I take the view that her decision was wrong in law. As it happens, the appellant did move from Barking to Keighley later that month (April this year) to be nearer his daughter, though the judge was not wrong to treat that as no more than a plan at the date of the hearing.

11. On the basis of that error of law, understandable as it was in what was otherwise a very impressive and careful decision, the parties were agreed that this case should be re-heard by another judge, this time at Bradford. That hearing has already been listed for 18 August. The appellant will be then be able to show, calling N's mother to give oral evidence unless there is some unforeseeable reason why not (and his representatives are reminded that witness summonses are available, if necessary), on the facts of what has taken place since the order for direct contact was made on 20 March, how far he has taken advantage of it, and how far he by the date of the hearing is taking, and intends to continue to take an active interest in N's upbringing. While the order may have no set terms, the appellant may reasonably be expected to show that he has taken every possible opportunity to achieve the direct contact ordered in principle.

Appeal allowed
Fresh hearing at Bradford, not before Judge Griffith, on basis set out above



(a judge of the Upper Tribunal)