



**The Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal number: IA/00712/2014

THE IMMIGRATION ACTS

**Heard at Field House
On November 19, 2014**

**Decision & Reasons Promulgated
On November 21, 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE ALIS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**MR CHARLES RODRIGUE N'GUESSAN
(NO ANONYMITY DIRECTION MADE)**

Respondent

Representation:

For the Appellant: Mr Avery (Home Office Presenting Officer)

For the Respondent: Mr Youssefian (Legal Representative)

DETERMINATION AND REASONS

1. Whereas the respondent is the appealing party, I shall, in the interests of convenience and consistency, replicate the nomenclature of the decision at first instance.
2. The appellant, born March 19, 1983 is a citizen of the Ivory Coast. He originally came to the United Kingdom as a student in 2004 and has lived here lawfully ever since. He graduated in 2010 and was granted further

leave to remain until May 23, 2013. In 2012 he married and he and his wife have two children born in March 2013 and August 2014. His wife submitted an application for indefinite leave to remain at the same time that he submitted his application to remain. She was granted indefinite leave to remain in November 2013 but the respondent refused the appellant's application on December 12, 2013. A decision to remove under section 47 of the Immigration, Asylum and Nationality Act 2006 was also taken.

3. The appellant appealed to the First-tier Tribunal under Section 82(1) of the Nationality, Immigration and Asylum Act 2002 on December 20, 2013. On August 27, 2014 Judge of the First Tier Tribunal Eldridge (hereinafter referred to as the "FtTJ") heard his appeal. He refused it under the Immigration Rules but allowed it under article 8 ECHR in a determination promulgated on September 2, 2014.
4. The respondent lodged grounds of appeal on September 9, 2014 and Judge of the First-tier Tribunal Hollingsworth granted permission to appeal finding it arguable the FtTJ had possibly erred in his approach to the article 8 assessment and in particular the factors he considered under Section 117B of the Immigration Act 2014.
5. Upon receipt of that permission the appellant lodged grounds of appeal, out of time, on October 24, 2014. Permission to appeal and an extension of time was granted by Judge of the First-tier Tribunal Frankish on November 3, 2014 on the grounds the FtTJ may have erred in failing to deal with the appellant's ground of appeal that leave to remain should be allowed on the basis he satisfied Section R-LTRP of Appendix FM of the Immigration Rules.

PRELIMINARY ISSUES

6. During the course of submissions Mr Avery agreed that as the appellant had raised Section R-LTRP of Appendix FM during the course of the original proceedings the FtTJ should have dealt with this ground. Mr Avery further agreed the FtTJ's approach in paragraph [16] and [17] was incorrect as a section 120 notice had been issued and the FtTJ had to deal with any grounds raised. I am satisfied, in light of this concession, that there had been a material error of law and I will in due course deal with this issue.

SUBMISSIONS

7. Mr Avery addressed me on his grounds of appeal. He argued the FtTJ had failed to have regard to all of the factors contained in Section 117B of the 2002 Act. He had failed to take into account the fact the appellant's wife was earning and would be able to support a properly brought entry clearance application. The FtTJ failed to carry out a proper

proportionality assessment which included full consideration of the public interest.

8. Mr Youssefian responded to the respondent's grounds of appeal and adopted his Rule 24 response. The appellant had clearly stated in paragraph [5] of his witness statement that he earned over £35,000 and his wife earned £15,000. The FtTJ was aware of this and that was why he concluded she would be unable to support a future entry clearance application because such an application ignored his earning ability. As regards section 117B of the 2002 Act he submitted that whilst there had been no direct reference to Section 117B(1) the FtTJ had carried out a balancing act and had had regard to relevant factors in Section 117B. His findings were open to him.
9. Both parties addressed me on the appellant's own ground of appeal but as Mr Avery accepted the FtTJ should have addressed the issue I do not set out the submissions save to say that following the decision of AS (Afghanistan) [2011] 1 WLR 385 the Tribunal was under a duty to consider any potential ground of appeal even if the respondent had not considered it.
10. I reserved my decision on all issues.

MY FINDINGS ON ERROR IN LAW

11. Although the appellant's grounds of appeal were lodged after the respondent's grounds of appeal it makes more sense to deal with his grounds firstly.
12. Both parties agreed that the FtTJ should have considered this ground of appeal. By failing to do so he erred. I have considered the materiality of this error with reference to the Rules.
13. Section R-LTRP of Appendix FM sets out the requirements that must be met if an application for limited leave to remain as a partner is to succeed.
14. The appellant satisfied R-LTRP 1.1(a), (b) and (c). A requirement of R-LTRP 1.1(c) is that the appellant is not caught by the requirements of S-LTR of Appendix FM. This appellant does not fall within those exceptions. Section E-LTRP sets out the eligibility requirements and as the appellant's wife has indefinite leave to remain then he satisfies Section E-LTRP 1.2 (b), 1.3 to 1.8 and 1.10. The appellant does not fall foul of E-LTRP 2.1 or 2.2 of Appendix FM.
15. It was not disputed that they earned over £18,600 between them and as this was an in-country application the Rules allow the appellant's income to be taken into account (Section E-LTRP 3.1(a)). There was no dispute

about accommodation or that the appellant could not meet the English language requirement as required in Section E-LTRP 4.1 of Appendix FM.

16. Accordingly, I find that the appellant should be granted limited leave to remain as a partner under the Rules.
17. I turn now to the respondent's appeal. The FtTJ found the Rules did not cover these facts and I am satisfied that was a conclusion he was entitled to come to.
18. Whilst he did not consider Section 117B(1) of the 2002 Act he did have regard to the Act as a whole as he referred to it in paragraph [27] of his determination. In that paragraph he noted the appellant positively met public interest requirements laid down in section 117B(2) and (3).
19. The appellant has always been here lawfully and there is nothing to suggest his immigration status was ever precarious. He therefore positively satisfied Sections 117B (4) and (5) and the fact the FtTJ did not specifically mention those subsections was not material to his decision.
20. In light of his wife's newly found status their youngest child, born August 2014, is British and the tribunal would also have had to consider section 117B(6) which states the public interest does not require the person's removal "where the person has a genuine and subsisting relationship with a qualifying child and it would not be reasonable to expect the child to leave the United Kingdom".
21. Whilst the FtTJ did not refer to Section 117B(1) this was not material in light of the other findings he either made or it can be assumed he would have made based on his other findings.
22. The evidence made clear that the appellant's wife would not satisfy the £18,600 requirement for an entry clearance application and the FtTJ took this into account in making his decision.
23. The FtTJ made findings that were open to him and allowed the appeal for the reasons he gave.
24. There is therefore no material error in his allowing the appeal on article 8 grounds.

DECISION

25. There was a material error of law only in so far as the Immigration Rules are concerned.

26. The original decision is set aside to the extent I allow the appeal under the Immigration Rules for the reasons set out above. I uphold the article 8 decision.
27. Under Rule 14(1) The Tribunal Procedure (Upper Tribunal) Rules 2008 (as amended) the appellant can be granted anonymity throughout these proceedings, unless and until a tribunal or court directs otherwise. No order has been made and no request for an order was submitted to me.

Signed:

Dated: **10 March 2015**

Deputy Upper Tribunal Judge Alis

TO THE RESPONDENT

I do not alter the fee award decision.

Signed:

Dated: **10 March 2015**

Deputy Upper Tribunal Judge Alis