



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/11835/2013

THE IMMIGRATION ACTS

Heard at Newport
On 19 December 2013

Determination given orally at
Hearing. Promulgated on
On 4 February 2014

Before

MR JUSTICE McCLOSKEY, PRESIDENT
MR C M G OCKELTON, VICE PRESIDENT
UPPER TRIBUNAL JUDGE GRUBB

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

ISIAKA ADEKUNLE RAJI

Respondent

Representation:

For the Appellant: Mr I Richards, Home Office Presenting Officer
For the Respondent: No Representative

DETERMINATION AND REASONS

1. The appellant is a national of Nigeria. He came to the United Kingdom as a student, with leave from 2010 when he arrived, which was due to expire on 30 October 2012.

He met the sponsor, who is a British citizen, at university. They are committed to each other and plan to remain together. They have a child who was born on 24 December 2012. On 29 October 2012, the day before the expiry of his leave, the appellant applied for leave to remain in the United Kingdom on the basis of this relationship. His application was refused on 22 March 2013 and the appellant was served with notice of refusal and notice of the intention to give directions for his removal under s.47 of the 2006 Act as in force at that time. The appellant appealed, Judge A E Walker allowed his appeal in the First-tier Tribunal and the Secretary of State now has permission to appeal to this Tribunal.

2. So far as the decision made under s.47 is concerned, it must now be accepted that although the judge made no specific reference to it, she ought to have allowed the appeal against that decision on the ground that it was not in accordance with the law. That necessarily follows from the decision of the Court of Appeal in Ahmadi [2013] EWCA Civ 512 and that of the Upper Tribunal in Adamally and Jaferi [2012] UKUT 00414 IAC: and that is so whatever decision is made on the appeal against the refusal of leave to remain.
3. So far as the latter decision is concerned, it is now common ground that insofar as the appellant's compliance with Appendix FM of the Statement of Changes in Immigration Rules, HC 395 as amended is concerned, the only outstanding question is whether the appellant was to be regarded as a partner within the meaning of those rules. The judge set out the relevant rules in the sections of Appendix FM with the heading E-LTRP, including at paragraph E-LTRP 1.10. the following requirement:

“The applicant and their partner must intend to live together permanently in the UK and in any application for further leave to remain as a partner (except where the applicant is in the United Kingdom as a fiancé(e) or proposed civil partner) and in any application for indefinite leave to remain as a partner, the applicant must provide evidence that, since entry clearance as a partner was granted under paragraph D-ECP1.1. or since the last grant of limited leave to remain as a partner, the applicant and their partner have lived together in the UK or there is good reason, consistent with a continuing intention to live together permanently in the UK, for any period in which they have not done so”.

4. She also set out in the definition section at paragraph GEN 1.2. the following:

“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”.

5. It was acknowledged before the judge at the hearing that at the time of that hearing the appellant and the sponsor had not lived together for two years. She heard

evidence from both of them and was clearly impressed by their credibility and sincerity and the genuineness of their relationship. At paragraph 35 of her determination she said this:

“[35] The respondent relies upon the fact that the appellant and the sponsor have not lived together for 2 years to justify the refusal of this application. However, under section E-LRTP the relationship requirement is that the applicant and their partner must be genuine and subsisting (1.7) and the applicant and their partner must intend to live together permanently in the UK (E-LRTP 1.10). In E-LRTP 1.10 there is reference to the applicant and the partner living together for 2 years but that is only in connection with any application for further leave to remain as a partner. In this case this is the appellant’s first application for leave to remain as a partner. The respondent then relies on the definition of partner contained in para GEN 1.2 Appendix FM which defines partner (in the context of this case) as ((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 the application. However GEN 1.2 contains the proviso “unless the context otherwise requires”. Given that E-LRTP limits the requirement for 2 years cohabitation to applications for further leave as a partner to applications for further leave as a partner (and this is not such an application) I consider that the proviso “unless the context otherwise requires” applies so that in order to qualify as a partner there is no requirement that the appellant and the sponsor should have cohabited for 2 years. I consider that under E-LRTP 1.7 the proper test is that of the relationship between the applicant and their partner must be genuine and subsisting and under E-LRTP 1.10 the applicant and their partner must intend to live together permanently in the UK”.

6. She thus held that the appellant met the requirements of the Rules as the definition of partner in GEN 1.2 which would have excluded him did not apply. The Secretary of State raises three issues in the grounds of appeal. The first is as follows:

“The judge found at paragraph 35 (**Findings**) that the appellant satisfied the criteria of paragraph GEN.1.2 (“*GEN 1.2 contains the proviso “unless the context otherwise requires”.*”). It is respectfully submitted that the proviso contained within the Rules is for the purposes of the respondent to indicate where a person does not satisfy one of the existing criteria of GEN.1.2.

Where an appellant does come under the sections of GEN.1.2., but does not satisfy the criteria therein (as is the case with the instant appeal where the appellant does not satisfy (iv) of GEN.1.2.), it is not for the Tribunal to apply this proviso in their findings.”

7. Mr Richards has not addressed us individually on that issue but we cannot accept the argument. The interpretation of the Rules is a matter for the Tribunal or the courts: that is so even to the extent to which the Rules are to be regarded not as legislation but as statements of policy approved by parliament. Compare for example Tesco Stores v Dundee City Council [2012] UKSC 13. It was for the judge to decide whether the Rules as properly interpreted covered the situation of the appellant.
8. The second ground is that the judge erred in her conclusion that the definition in GEN 1.2 did not apply. It appears to us that on that ground the Secretary of State is

clearly right. Indeed it is very difficult to understand the judge's reasoning. She referred specifically to the reference to two years in E-LRTP; 1.10 but there is no such reference in that paragraph either in any official copy that we have been able to see or in the version that she set out in her judgement. We do not know what led her to the conclusion that she reached, but it appears to us to be clearly wrong. GEN 1.2 defines a partner for the purposes of an application such as that made by the appellant and it is clear and accepted that the appellant's position was not that of a person who had been living with his sponsor for more than two years.

9. The third point raised by the Secretary of State is that at the time of the hearing before us, that is to say on 19 December 2013, other things being equal, the appellant now is entitled to succeed under the Rules. We have not entirely understood the basis upon which the Secretary of State reaches that decision in the grounds supporting the application for permission to appeal to this Tribunal, but Mr Richards, who appears for the Secretary of State before us has frankly acknowledged that the position at present is that because of the provisions of paragraph GEN 1.9 of Appendix FM the appellant is not required to make a further application, but, because he has a pending appeal, is entitled to have his entitlement regulated by the facts as they are today.
10. Our conclusion is therefore as follows. The interpretation of the Rules is a matter for the judge but the judge erred in law in her interpretation of the definition of partner in GEN 1.2 and its application to E-LRTP 1.10. She should have dismissed the appeal on the basis that the appellant and the sponsor have not been living together for two years. We set aside her determination.
11. We substitute our decision. There is no good reason to do other than adopt the judge's findings of fact and credibility. For the reasons identified in the grounds and endorsed by Mr Richards, the appellant is now entitled to have his appeal allowed and we allow it.
12. We therefore direct that the Secretary of State grant the appropriate period of leave to the appellant as provided by the rules.

C M G OCKELTON
VICE PRESIDENT OF THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER
Date: 28 January 2014