



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

Appeal Numbers: IA/16221/2013,
IA/16226/2013
IA/16229/2013
IA/16230/2013

THE IMMIGRATION ACTS

**Heard at Field House
On 11 February 2014**

**Determination Promulgated
On 11th June 2014**

Before

**THE HON. MR JUSTICE JAY
(SITTING AS A JUDGE OF THE UPPER TRIBUNAL)
UPPER TRIBUNAL JUDGE PERKINS**

Between

**OYEGOKE ADEGBOYEGA ADEFUSI
FUNKE ADEFUSI ADEFUSI
DANIEL AYOLUWA ADEFUSI
EMMANUEL OREOLUWA ADEFUSI**

Appellants

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr A K Stone, Counsel instructed by M A Consultants
For the Respondent: Mr S Walker, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellants are citizens of Nigeria. The first two appellants are married to each other. The third and fourth appellants are their sons. The third appellant was born on 24 April 2008 and so is now 6 years old. The fourth appellant was born on 13 January 2006 and so is now 8 years old. The first appellant entered the United Kingdom some time before 15 September 2004 with permission as a visitor. The second appellant had a multi-entry visitor visa and she entered the United Kingdom, with permission, some time before 19 December 2004. They

have lived in the United Kingdom since then. The third and fourth appellants were born there.

2. The first appellant applied for an EEA residence card on 10 March 2009 but the application was refused on 12 January 2010. This application is of little, if any, relevance to the issues that we have to decide but it does show that the first appellant had some concern about his immigration status before making the application on 15 October 2009 which, eventually, led to the appeal before us.
3. On 15 October 2009 each of the appellants applied for further leave to remain but their applications were refused on 19 February 2010. The decisions of 19 February 2010 were not immigration decisions within the meaning of the phrase in section 82(2) of the Nationality, Immigration and Asylum Act 2002 and so could not be appealed to the Tribunal.
4. The appellants asked the respondent to make immigration decisions. They then brought judicial review proceedings in an effort to secure such a decision and those proceedings were compromised on 14 February 2013. On 26 April 2013 the respondent made removal decisions in each case and explained the decision in a letter of the same date. The appellants subsequently appealed to the First-tier Tribunal. They said that removing them interfered disproportionately with their private and family lives. The First-tier Tribunal's determination of their appeals was promulgated on 28 November 2013. It dismissed the appeals and it is that decision that is the subject of the appeal before us.
5. The chronology concerning the judicial review proceedings and the terms of the compromise are considered below.
6. In the letter dated 26 April 2013 the respondent said that because the appellants had remained in the United Kingdom beyond their period of permitted leave they were liable to administrative removal.
7. The respondent considered their "family life under Article 8 which from 9th July 2012 falls under Appendix FM EX.1 of the rules" but found that they were not entitled to remain. We note that Appendix FM is set out as an amendment to the Immigration Rules in HC 194. According to the provisions headed "Implementation", "Appendix FM applies to applications made on or after 9 July 2012 as set out in paragraph 91 of this Statement of Changes". It is apparent that Appendix FM did not apply to applications made but not decided before 9 July 2012 but it was (the appellants say wrongly) applied in these cases by the respondent.
8. Appendix FM is the Family Members Appendix of the Immigration Rules. Section EX bears the title "Exception" but is probably best understood as identifying further conditions that an applicant relying on the Family Members Appendix must meet before that person is entitled to remain under the rules. It is not a "free standing" consideration which trumps other rules (see Sabir (Appendix FM – EX.1 not free standing) [2014] UKUT 63 (IAC))
9. In the case of both the first and second appellant the respondent addressed her mind to the "Requirements of Limited Leave to Remain as a Partner" (R-LTRP in the Immigration Rules). Although both the first and second appellant wanted to remain in the United Kingdom the respondent, correctly, treated each appellant

separately and examined their circumstances to see if they were entitled to remain. This required the slightly artificial exercise of examining their relationship with their partner (in fact their spouse) without regard to the partner having also made an application.

10. The respondent decided that neither of these appellants came within the scope of this rule because neither of their partners were settled in the United Kingdom or otherwise able to satisfy the requirements of E-LTRP.1.2.
11. Additionally, because in each case the appellant was in the United Kingdom in breach of immigration laws (which E-LTRP.2.2 prohibits), each application had to be refused. This requirement, that the *applicant* is not in the United Kingdom in breach of immigration law, is excused if EX.1 applies but the requirement (broadly) that the *partner* is lawfully in the United Kingdom cannot be excused. It follows that even if EX.1 does apply neither appellant could show that they met the requirements of the rules concerning leave to remain as a partner.
12. The respondent then asked if the appellants came within the Requirements of Leave to Remain as a Parent (R-LTRPT). To satisfy these requirements the first two appellants would have to satisfy each of the requirements of Section E-LTRPT (Eligibility for Limited Leave to Remain as a Parent.)
- ~~13.~~ The respondent decided that the first two appellants are joint parents bringing up their children together and so did not come within the rules (E-LTRPT 2.3). Section EX1 does not apply to this rule. This is important. If the Secretary of State is right in her application of E-LTRPT.2.3, EX1 is not relevant to the applications by joint parents.
- ~~14.~~ Additionally, their applications could not succeed as parents because they were in the United Kingdom in breach of immigration controls, contrary to E-LTRPT.3.2, and EX1 did not apply. These things meant that the first two appellants did not satisfy the requirement of leave to remain as a parent.
15. The respondent then asked if the third and fourth appellants had established a right to remain with reference to Section E-LTRC (Eligibility for Leave to Remain as a Child). The respondent concluded that they had not because neither of their parents had or would be given leave to enter or remain as required by E-LTRC.1.6.
16. Section EX is not relevant to the application by the minor appellants. It applies where the *applicant* has a “genuine and subsisting parental relationship” and that is clearly not the case in an application made as a child.
17. It follows that even if the appellants (or any of them) met the requirements of section EX1 they could not satisfy the requirement for leave remain as partners, parents or children.
18. However, even though the respondent decided that appellants were not entitled to stay because of the operation of rules where EX1 did not apply, the refusal letter then explained that none of the appellants came within EX1 even if it was a relevant consideration in their cases. It is a requirement of EX.1.(a)(i)(cc) that the applicant has a relationship with a child who “has lived in the UK continuously for a least 7 years immediately preceding the date of application”

and it is requirement of EX.1.(b) that “it would not be reasonable to expect the child to leave the UK”. According to the respondent the children had not lived in the UK continuously for at least 7 years immediately preceding the date of application and it would be reasonable to expect the child to leave the UK. It follows that the respondent gave two reasons for concluding that the appellants did not meet the requirements of EX.1 even if, contrary to the respondent’s contentions, the appellants could satisfy the rules if EX.1 applied.

19. The refusal letter than considered the appellants’ cases with regard to paragraph 276ADE of HC 395. This rule purports to set out the “requirements to be met by an applicant for leave to remain on the grounds of private life”. Having decided that it would be reasonable to expect the minor appellants to leave the United Kingdom and live with their parents the respondent decided that the parents could not rely on 276ADE because they had not lived for long enough in the United Kingdom. The respondent then refused the application with regard to paragraph 276ADE(iii) and (vi). Paragraph 276ADE (iii) applies where the applicant has at least 20 years’ residence and paragraph 276ADE(vi) applies where the applicant has lost ties with his or her country of nationality.
20. The respondent then considered the appellants’ circumstances including the length of their residence in the United Kingdom and representations made on their behalf to see if there were “exceptional circumstances” that would justify a decision to allow the applications. She found none and refused the applications.
21. We consider now the decision made by the First-tier Tribunal. It recorded that the relevant Rules are 276ADE and Appendix FM of HC 395. It then set out the approach to Article 8 cases set out in R v SSHD ex parte Razgar [2004] UKHL 27. It acknowledged the documents in the case and summarised the cases of the respective parties.
22. The first and second appellants came to the United Kingdom in 2004 with permission as visitors but apparently without having any intention of returning to Nigeria. They had lived in the United Kingdom without permission from 2004 until making an application in 2009. Their first two children, the third and fourth appellants were born in 2006 and 2008.
23. The appellants concentrated on the rights of the minor appellants. It was said that they were well integrated into the United Kingdom and had never visited Nigeria and so were being returned to a country whose culture and society was alien to them. The appellants’ core point was that they should be allowed to remain in the United Kingdom because the oldest child had lived in the United Kingdom continuously for at least seven years. The first two appellants would ordinarily have to depart from the United Kingdom because they were in breach of UK Immigration Laws (see E-LTRP.2.2.) but they maintained there was an exception because paragraph EX.1 applied. This paragraph applies if (EX.1.1(a)(i)(cc)) the appellant “has lived in the UK continuously for at least seven years immediately preceding the date of application”. This Rule also requires that it would not be reasonable to expect the child to leave the UK (EX.1.(a)(ii)).

24. The Tribunal noted that the appellants attended a church that is aligned to a Pentecostal denomination that had originated in Nigeria and was still active there. Although the adult appellants were described as integrated into the community by their pastor there was no particular evidence about any integration on the part of the third and fourth appellants. Their school reports noted that they got on well with their peers but the fourth appellant was known to distract other children. The First-tier Tribunal said, and we find this impossible to criticise, that:

“there was no evidence that the third and fourth appellants were other than normal 5 and 7 year old boys, albeit the former having particularly positive personal qualities. I identified no need for any further evidence as to their needs and welfare.”

25. The judge found that the appellants did not satisfy the requirements of the Rules to remain.

26. The judge also noted an earlier refusal letter commenting on the first and second appellants choosing to travel to Nigeria in February 2004 to marry where their wedding was well attended by family and friends. The Secretary of State saw this as an indication that they had strong links in Nigeria and that facilitated their return.

27. The First-tier Tribunal then said at paragraph 17:

“In qualification of what I have stated above I do find the fourth appellant as having established, under paragraph 276ADE of the Rules, a private life in the United Kingdom but it is my decision that that conclusion is academic in terms of the fourth appellant’s best interests and the situation of the appellants as a whole. It is a conclusion that, in terms of the Rules, does not assist the other appellants in this appeal. Outside of the Rules, it is not disproportionate, given the poor immigration history of the appellants and the public policy of immigration control, that the first three appellants be removed to Nigeria and the fourth appellant, in his best interests and in the interest of preserving the family unit, be returned with them.”

28. It then dismissed the appeals.

29. Permission to appeal to the Upper Tribunal was given by a First-tier Tribunal Judge because:

“The grounds for permission contend that the Judge fell into material error by failing (1) properly to appreciate the distinction between applications made by and after 8th July 2012 in terms of operation of the “new” Immigration Rules and (2) to adopt a structured approach to the Article 8 inquiry and properly to consider the section 55 best interests of the children.”

30. We deal first with the second point because this is, we find, the more straightforward of the two. The First-tier Tribunal did not expressly set out the five stage approach suggested by Lord Bingham in R v. SSHD ex parte Razgar [2004] UKHL 27 and the consideration of section 55 of the Borders, Citizenship and Immigration Act 2009 is somewhat brisk. Nevertheless we identify no error of law. Clearly (see paragraph 17 of the determination) the First-tier Tribunal decided that, even though the oldest child (the fourth appellant) had lived all of his life in the United Kingdom, he had not established a very strong private and

family life outside the home and that his, and the third appellant's, best interests lay in continuing to live with his parents.

31. Removing the parents was clearly proportionate. They had stayed in the United Kingdom without permission for many years and there were no exceptional factors identified to justify their remaining. Preserving family unity was important and so it was proportionate for each of the appellants to be removed.
32. We agree with Mr Walker that the judge's approach, if not ideal, was sufficiently detailed in the light of the case as a whole to show proper regard for the needs of the children. No material error is shown in the decision to dismiss the appeal on human rights grounds unless the appellants had shown that they were entitled to remain under the rules which is what they contend.
33. This brings us to the first ground identified above, namely the alleged failure to "appreciate the distinction between applications made by and after 8th July 2012 in terms of operation of the "new" Immigration Rules".
34. As we indicated above, Appendix FM and paragraph 276ADE of HC 395 were introduced by amendment of the Immigration Rules in an attempt to codify the conditions to be met by a person seeking to enter or remain in the United Kingdom by reason of his "family life" (Appendix FM) or his "private life" (paragraph 276ADE). Both were introduced by HC194 and applied to applications made after 9 July 2012. Unusually for amendments to the Immigration Rules, there were transitional provisions set out at the start of Part 8. Broadly, if an application for entry clearance, leave to remain or indefinite leave to remain has been made before 9 July 2012 and the application has not been decided, it fell to be decided in accordance with the rules in force on 8 July 2012.
35. The grounds develop this point by complaining that the respondent and subsequently the Tribunal had regard to Appendix FM and paragraph 276ADE.
36. For the reasons already given we are satisfied that the applications had to be refused under Appendix FM if it applies.
37. The appellants contend at paragraph 6 of their grounds that EX 1(a) applies because "the applicant has a genuine and subsisting parental relationship with a child who" meets certain conditions including having lived in the United Kingdom for 7 years before the application was made but even if it does, none of the appellants meet all of the requirements of the relevant parts of appendix FM.
38. We set out below paragraph 276ADE as presently in force:

276ADE. The requirements to be met by an applicant for leave to remain on the grounds of private life in the UK are that at the date of application, the applicant:

- (i) does not fall for refusal under any of the grounds in Section S-LTR 1.2 to S-LTR 2.3. and S-LTR.3.1. in Appendix FM; and
- (ii) has made a valid application for leave to remain on the grounds of private life in the UK; and
- (iii) has lived continuously in the UK for at least 20 years (discounting any period of imprisonment); or(iv) is under the age of 18 years and has lived continuously in the UK for at least 7 years (discounting any period

of imprisonment) and it would not be reasonable to expect the applicant to leave the UK; or

- (iv) is under the age of 18 years and has lived continuously in the UK for at least 7 years (discounting any period of imprisonment) and it would not be reasonable to expect the applicant to leave the UK; or
- (v) is aged 18 years or above and under 25 years and has spent at least half of his life living continuously in the UK (discounting any period of imprisonment); or
- (vi) is aged 18 years or above, has lived continuously in the UK for less than 20 years (discounting any period of imprisonment) but has no ties (including social, cultural or family) with the country to which he would have to go if required to leave the UK.

39. It is obvious from inspection that neither the first, second, nor third appellants can come within the provision of this rule.
40. The fourth appellant might be able to benefit from it because he is a child aged over 7 years who has lived his entire life in the United Kingdom but he can only come within the rules of he had spent 7 years in the United Kingdom “at the date of application”.
41. He was born on 13 January 2006 and so had spent 7 years in the United Kingdom on 13 January 2013. By then paragraph 276ADE had been amended from its original form to the form set out above. The fourth appellant would have to show that “it would not be reasonable to expect the applicant to leave the UK”. These words were added to paragraph 276ADE by paragraph 201 of HC 760. The First-tier Tribunal clearly decided that it was reasonable to expect the applicant to leave the UK because he decided that the applicant’s best interests lay in remaining with his parents.
42. It follows that there can be no material fault in a decision dismissing the appeals with reference to paragraph 276ADE and Appendix FM of HC 395 if, in fact, they applied to the case.
43. The grounds supporting the application for permission to appeal argue that the date of application has been identified wrongly. The grounds contend there are two decisions. The first was made in 2010 in respect of an application made in 2009. That generated an appeal and the appeal was dismissed. However there is also a decision made on 26 April 2013. It was that decision that was the subject of the appeal but, according to the grounds, the decision should have been made in accordance with the law in force on 8 July 2012 because the application leading to the decision was made before 9 July 2012 so, in accordance with HC 194 which brought Appendix FM and paragraph 276ADE into force, the new Rules did not apply to applications that had already been made. It was submitted that the respondent and the First-tier Tribunal were wrong to have regard to Appendix FM and paragraph 276ADE because the application was made before 8 July 2012 and had not been decided by then.
44. The high water mark of the appellants’ case that the application predated the rule change in July 2012 is the Form of Consent that compromised the judicial review action on 14 February 2013. It said:

“UPON THE DEFENDANT agreeing within 3 months of the date of lodging of the Acknowledgement of Service name by 23rd April 2013 agreeing to reconsider the Claimant’s case”.

45. The use of the word “reconsider” necessarily requires the respondent to look again at something that had already been considered, but we cannot accept that this meant that the parties regarded as extant an application that had been made and decided by being refused on 19 February 2010. The judicial review proceedings did not decide that the decision of 19 February 2010 was wrong. The complaint was that there had not been an immigration decision. Properly understood, the respondent agreed to make a new decision. That must have meant a decision on the new evidence, that is in the light of the current circumstances and there is no sensible way in which circumstances in existence in February 2013 could be considered in an application made in October 2009. However, if they were the then oldest child was only three years old and the appellants’ applications could not be expected to succeed.
46. We are satisfied that the respondent was right to decide the applications as if they were made when she decided them. She applied the rules to the appellants’ circumstances and found that the applications had to be refused.
47. The First-tier Tribunal Judge agreed with her. He did not err. However the appeal was dismissed on human rights grounds *and* under the rules. It is, we find, immaterial if the First-tier Tribunal Judge wrongly had regard to Appendix FM and paragraph 276ADE. If the First-tier Tribunal Judge had thought that he had to dismiss the appeal on human rights grounds if the requirements of FM were not met then he would have erred, but he did not. He plainly dismissed the appeal “under the Immigration Rules and on human rights grounds” and he referred at paragraph 17 to considering the case “[o]utside the rules”.
48. If the First-tier Tribunal Judge had decided that the post July 2012 rules did not apply then he would have made precisely the same decision that he did. There are no “pre July 2012 rules” under which the appeal should have been allowed. The effect of article 8 of the European Convention on Human Rights would have been considered without regard to the new rules, but it would not have made any difference. The judge would have found that the disruption to the private and family lives of the appellants was proportionate to the proper purpose of enforcing immigration control. The two older appellants decided to remain in the United Kingdom without permission and cannot complain if they are made to return to their country of nationality. Their private and family lives outside the home in mainly conducted through their church and whilst they have no doubt made a positive contribution to their community this does little to weigh against the need to enforce immigration control.
49. The youngest appellant is not old enough to have established a weighty “private and family life” of his own.
50. The older appellant has built up a significant private and family life, but he will not be able to remember his early years in the United Kingdom and there is no evidence that he built up unusual or compelling ties in the community. His best interests lie in his going to Nigeria with his parents and siblings rather than remaining in the United Kingdom without them. Although it might be desirable

for him to remain in the country that he knows, he is not a British citizen and he can be expected to adjust to life in Nigeria with the support of his family. It is not so desirable that he is spared the disruption inherent on his going to Nigeria that the rest of his family should be allowed to remain with him. His case was even weaker when the First-tier Tribunal heard the appeal in November 2013.

51. These appeals distil down to some simple points. None of the appellants are entitled to remain under the rules. None of them can show that removing them would interfere disproportionately with their private and family lives. The First-tier Tribunal did not err materially and we dismiss these appeals.

Signed
Jonathan Perkins
Judge of the Upper Tribunal



Dated 10 June 2014