



**UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER)
IA/44246/2013**

APPEAL NUMBER:

THE IMMIGRATION ACTS

Heard at: Field House

On: 3 November 2014

Prepared: 19 November 2014

Determination

Promulgated

On: 21 November 2014

Before

DEPUTY UPPER TRIBUNAL JUDGE MAILER

Between

**MR MATTHEW OMOTAYO ANOFI
NO ANONYMITY DIRECTION MADE**

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation

For the Appellant: Ms S Sharma, counsel (instructed by Ada Solicitors)

**For the Respondent: Mr S Whitwell, Senior Home Office Presenting
Officer**

DETERMINATION AND REASONS

1. For the sake of convenience I shall refer to the appellant as the secretary of state and the respondent as the claimant.

2. The claimant is a national of Nigeria, born on 10 July 1984. His appeal against the secretary of state's decision dated 10 October 2013 refusing his application for further leave to remain in the UK and to remove him from the UK by way of directions under s.47 of the Immigration, Asylum and Nationality Act 2006 was allowed by First-tier Tribunal Judge Petherbridge in a decision promulgated on 23 July 2014.
3. The Judge found at paragraph 40 of his determination that there was no evidence that the claimant could show that he was in a durable relationship with his sponsor at the date of the decision refusing his application for further leave to remain. The secretary had requested full details and documents supporting such an assertion.
4. The Judge then referred to other evidence before him including his partner's alleged mental health problems following the birth of her child.
5. He did not accept that the evidence supported a finding that the claimant is the main carer of his son.
6. The Judge found that the appellant's partner was engaged in studies five days a week and to enable her to continue with those studies, the claimant looks after their child [42].
7. The Judge then stated at paragraph 43 that he had to consider the claimant's application "with regard to paragraph EX.1 of the Immigration Rules." Having considered the claim with reference to that paragraph, he was satisfied that there was a genuine and subsisting relationship between the claimant and his son and that he met the requirements of paragraph EX.1. It was upon that basis that the appeal was allowed.
8. On 18 September 2014, First-tier Tribunal Judge McDade granted the secretary of state permission to appeal as it was arguable that the eligibility requirements had not been satisfied.
9. Mr Whitwell submitted that the Judge found that there was no evidence that the claimant was in a durable relationship with his partner; he had thus not met the eligibility requirements for leave to remain as a partner. He also failed to meet the eligibility requirements as a parent as he did not have sole responsibility for the child.
10. Mr Whitwell also submitted that the claimant was in the UK with leave granted for a period of only six months. He thus failed the immigration status requirement at E-LTRP.2.1 (b).
11. The Judge erred in law by applying EX.1 as a "stand alone provision." The consideration of the claimant's Article 8 rights fell within Appendix FM. Paragraph EX.1 does not form an independent basis for an appeal to succeed.
12. Having found that the claimant did not meet the rules, he could not succeed under Article 8 as no compelling or exceptional circumstances were identified.

13. On behalf of the claimant, Ms Sharma, who represented the claimant before the First-tier Tribunal, submitted that even if there is a material error of law, the First-tier Tribunal Judge should have gone on to consider the appeal and allowed it under Article 8. She submitted that the same arguments resulting in a positive finding under the rule meant that the Judge would inevitably have allowed the appeal.
14. The skeleton argument prepared on behalf of the claimant had been placed before the First-tier Tribunal. It also relied on Article 8 of the Human Rights Convention.
15. Mr Whitwell submitted that it was "a difficult submission to make" that the Judge would have gone on to consider Article 8. On the face of it, there had been no application to amend the grounds of appeal before him. The Judge was thus restricted to a consideration of Appendix FM and paragraph 276ADE of the rules.
16. In any event, he submitted that there has been no attempt made by the claimant to "cross appeal" against the alleged failure of the First-tier Tribunal Judge to consider a grant of discretionary leave to remain under Article 8.

Assessment

17. I have had regard to the decision of the Upper Tribunal in the appeal of **Sabir (Appendix FM-EX.1 not free standing) [2014] UKUT 00063 (IAC)**. It was held in that case that it is plain from the architecture of the rules as regards partners that EX.1 is "parasitic" on the relevant rule within Appendix FM that otherwise grants leave to remain. If EX.1 was intended to be a free-standing element, some mechanism of identification would have been used. The structure of the rules as presently drafted requires it to be a component part of the leave granting Rule. That is made plain by the respondent's guidance dated October 2013.
18. It was accepted by Ms Sharma that the First-tier Tribunal Judge had in the circumstances erred in law in finding that EX.1 was a free standing paragraph to be considered irrespective of the other requirements of Appendix FM. There has thus been a material error of law.
19. I thus set aside the decision of the First-tier Tribunal.
20. In re-making the decision, I find that the claimant cannot meet the immigration rules as set out in Appendix FM. The finding of the First-tier Tribunal Judge in that regard has not been challenged.
21. Nor has the claimant made an application for permission to appeal against the asserted failure by the First-tier Tribunal Judge to consider his appeal pursuant to Article 8 of the Human Rights Convention.
22. In any event, I do not accept the submission that the First-tier Judge would inevitably have allowed the appeal pursuant to Article 8 of the Human Rights Convention.

