



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: HU/10105/2017

**THE IMMIGRATION ACTS**

Heard at Field House  
On 19 June 2017

Decision & Reasons Promulgated  
On 14 August 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE I A LEWIS

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

BERHANE [L]  
(ANONYMITY DIRECTION NOT MADE)

Respondent

**Representation:**

For the Appellant: Mr N Bramble, Senior Home Office Presenting Officer  
For the Respondent: Mr [ME], sponsor.

**DECISION AND REASONS**

1. This is an appeal against the decision of First-tier Tribunal Judge Lloyd promulgated on 21 November 2017 in which he allowed the appeal of Ms Berhane [L] against a decision of the Secretary of State for the Home Department to refuse leave to remain made on 30 August 2017.

2. Although before me Ms [L] is the respondent and the Secretary of State is the appellant, for the sake of consistency with the proceedings before the First-tier Tribunal I shall hereafter refer to Ms [L] as the Appellant and the Secretary of State as the Respondent.
3. The Appellant is a national of Ethiopia born on 24 May 1983. She is married to Mr [ME] (d.o.b. 20 April 1962), a British citizen. They were married on 8 June 2015. On 18 August 2017 the Appellant gave birth to the couple's child whilst in the UK pursuant to a visit visa. The Appellant has visited the United Kingdom on a number of occasions, but most recently entered the United Kingdom pursuant to entry clearance as a visitor on 29 July 2017.
4. On 2 August 2017 the Appellant made the application the refusal of which has become the subject of these proceedings. It was whilst that application was pending that her child was born.
5. The Respondent refused the application on 30 August 2017.
6. The bundles before the Tribunal do not contain a complete version of the Respondent's 'reasons for refusal' letter ('RFRL'). However it is abundantly clear from the pages of the RFRL that are available that the Respondent refused the application - which was based on being a partner - by reference to paragraph E-LTRP2.1 of Appendix FM of the Immigration Rules. In short: the Appellant could not succeed under the Rules because she was present in the UK as a visitor when she made her application. Otherwise it appears that it was accepted that the other requirements of the Rules were satisfied by the Appellant: it is apparent from page 3 of the RFRL that the Appellant met the eligibility 'relationship' requirement, the eligibility 'financial' requirement, and the eligibility 'English language' requirements.
7. The Respondent considered paragraph EX.1 in the RFRL with reference to the Appellant's child. However, in this regard it was noted that the evidence that had been submitted with the application did not include a full UK birth certificate showing the child's parentage: on that basis the Respondent was not satisfied of the certainty of the child's paternity.
8. On appeal the Appellant provided documentation confirming the status of her child, and indeed there is now on file a copy of the child's British passport confirming nationality. There has never been any dispute as to the nationality of the Appellant's partner Mr [ME] to whom she was married on 8 June 2015. Accordingly insofar as she is the mother of a British citizen child of whom Mr [ME] was the father - not accepted in the RFRL - the evidence before the First-tier Tribunal established such facts.

9. However, necessarily there was nothing in the evidence before the First-tier Tribunal that could overcome the issue as to her status as a visitor.
10. The appeal before the First-tier Tribunal was considered 'on the papers' without a hearing at the election of the Appellant.
11. Judge Lloyd allowed the appeal for reasons set out in the Decision promulgated on 21 November 2017.
12. The Respondent was granted permission to appeal by First-tier Tribunal Judge Hodgkinson on 18 April 2018.
13. Under the sub-heading 'Reasons and Detailed Findings' the First-tier Tribunal Judge opened his conclusions with the following:
  14. *With the appeal the Appellant provided copies of the marriage certificate, birth certificate, the child and her husband's passport. With a subsequent letter to support the appeal, a copy of the child's passport was also provided. This indicated that the child was a British citizen, the birth certificate confirmed the Appellant's husband as being the father.*
  15. *The Respondent has not provided any further response to the production of these documents. In the absence of any objection to those documents I find that the copies represent genuine documents.*
  16. *The Appellant has met the primary ground of refusal in respect of proving her child's nationality. The first leg of Section EX.1 is therefore met."*
14. The Judge then went on to consider further elements of paragraph EX.1 of Appendix FM and concluded at paragraph 18 that the Immigration Rules were satisfied particularly in regard to Section EX.1. At paragraph 19 the Judge went on to consider the weight to be accorded to public interest in effective immigration control – which he considered *"to be greatly reduced"* in circumstances where, on his finding, the Immigration Rules had been met.
15. The Judge was in fundamental error. The Appellant did not satisfy the requirements of the Immigration Rules. The Judge failed to address the issue of the Appellant's status as a visitor at the time she made her application.

16. Whilst the Judge identified that the Rules were not satisfied because at the time of the application the Appellant was a visitor in the UK (paragraph 8), he does not seem to have given this issue any further considerations.
17. For the avoidance of any doubt, the fact that the Appellant was able to meet the substance of paragraph EX.1 does not avail the Appellant under the Rules because paragraph EX.1 is not a freestanding provision. Paragraph EX.1 would only be of potential application by virtue of R-LTRP.1.1(d)(iii); but pursuant to R-LTRP.1.1(d)(ii) the Appellant would also need to meet the requirement of E-LTRP.2.1, which specifies that the applicant must not be in the UK as a visitor.
18. Accordingly, the Judge was in error in stating that the Appellant had satisfied the Immigration Rules.
19. Moreover, it is difficult to see how such an error could not have coloured the evaluation of proportionality under Article 8. Indeed the Judge expressly stated that the *“weight to be attributed to the public interest in effective immigration control [is] greatly reduced”* (paragraph 19).
20. However, notwithstanding my observations above, this was not the basis of the Respondent’s challenge. The Respondent’s challenge pleads quite different matters. In note in particular the following passages of the application for permission to appeal. Having submitted that family life could continue in Ethiopia with no unduly harsh consequences, it is then argued:
  - “4. In any event there are no reasons given as to why the Appellant may not return to Ethiopia in order to obtain the correct entry clearance. It is submitted that this is proportionate in light of the way the Appellant gained entry to the UK. The appeal was heard on the papers so the Respondent did not have the opportunity to raise at the hearing the issue that the Appellant had applied for entry clearance with the stated intention of staying in the UK for one month. She then applied for further leave in the UK less than two months later.
  5. It is unlikely that the birth of her child in the UK on 18 August 2017 came as a surprise. It is therefore submitted that the Appellant made a false declaration on her visit visa application form which is appended to these grounds. The Respondent did not have the opportunity to raise the argument as the appeal was made on the papers. It is submitted that in the interests of justice that this issue should be taken into account. It is also submitted that it is proportionate in the public interest to maintain an effective immigration control to expect the Appellant to leave the UK in order to apply for correct entry clearance. The refusal decision does not require the British child to leave the UK.”

21. In my judgement it is not appropriate or justified for the Respondent to plead that there had not been an opportunity to raise the issue that the Appellant had applied for entry clearance with the intention of staying in the UK for one month, and that this might now be seen as having been a false declaration. The Respondent had the opportunity of raising the issue at the time of the decision and incorporating it into the RFRL. The Respondent was in no way deprived of the opportunity of raising this matter because of the Appellant's election to have the appeal determined 'on the papers'. (Although there is not on file a complete copy of the RRFL, the manner of the drafting of the grounds does not suggest the issue was raised therein. Indeed Mr Bramble acknowledged that this was not a point raised by the Respondent prior to the application for permission to appeal to the Upper Tribunal.)
22. In short the matters now sought to be raised by way of challenge to the decision of the First-tier Tribunal were not matters that had been raised by the Respondent.
23. This appears to be case notwithstanding that the Appellant and her husband attended for interview by the Respondent . This is evidenced by the materials placed before the Tribunal by the Appellant: see in particular letter dated 20 October 2017 which in large part makes a complaint about the manner of the interview conducted on that occasion and the length of time that the Appellant had been kept waiting whilst with her very young child. Irrespective of the contents of the Appellant's letter in this regard, it is indeed the case that nothing of the interview conducted has been produced in the Respondent's materials filed before the First-tier Tribunal, and nothing supposedly adverse from any interview has seemingly been raised in the RFRL.
24. It is too late in for the Respondent to be raising by way of challenge to the decision of the First-tier Tribunal those matters set out in the grounds of appeal that formed no basis of the refusal decision itself.
25. In so far as the Respondent's grounds also plead that the Judge failed to give adequate reasons for his finding in respect of return to Ethiopia, it is inherent in the challenge that the Respondent recognises the Judge had regard to the British citizenship of the Appellant's partner and their child. Whilst the Judge's reasoning at paragraph 17 is brief - referring also to Mr [ME]'s well-paid employment in the UK, and the child's best interests - it seems to me sustainably adequate. In my judgement this aspect of the Respondent's decision amounts to a disagreement as to evaluation and conclusion, and does not identify an error of law.

26. Accordingly in substance I find myself faced with: a manifest error on the face of the decision which has not been pleaded in the challenge; and a challenge pleaded that raises matters that could have been raised before the First-tier Tribunal but were not.
27. In those circumstances I turn briefly to a wider consideration of the appeal. This is a case in which is not now disputed that the Appellant gave birth to a British citizen child who as of today is still under one year old. She lives in the United Kingdom with her British citizen husband, who on the Respondent's own findings satisfied the financial requirements in order to sponsor a spouse. The only matter standing in the way of the Appellant's application as a spouse was the fact that she had entered as a visitor and was therefore disqualified from 'switching'. The remedy for that, it is suggested, is that the Appellant should now quit the UK and make the appropriate application from abroad. Mr Bramble recognises that that may cause some potential disruption to family life. The Appellant either leaves without her child or leaves with her child; if the latter, she either leaves her partner behind, or the family relocate together for the duration of the Appellant's application. All such alternatives will involve, at different levels, uncertainty and interference with either family or private life.
28. In the circumstances, bearing in mind the principle in **Chikwamba**, I can identify no very good reason why the Appellant should be expected to quit the UK simply to apply for entry clearance when she has in substance demonstrated that she meets the various requirements of the Immigration Rules as a spouse.
29. In saying so, I have had regard to the allegation now raised as to the possibility of the Appellant having employed deception. In the first instance it seems to me that I should approach that on the basis that no such allegation was made at the date of the decision that is the subject of these proceedings. To that end it seems to me that it is not a proper basis now to refuse the appeal. Even now it has not been raised in any formal way (such as an addendum to the RFRL), and has not been particularised in anything more than basic detail; it is unclear whether the matter was put to the Appellant when interviewed, and if so what was made of her response or supported.
30. Moreover, irrespective of any possible element of deception the events that have subsequently transpired with regard to the birth of the Appellant's child, and where there is nothing else said contrary to the application by reference to the Immigration Rules or otherwise in the RFRL beyond the Appellant's status as a visitor, are all such as to point in the direction of it being disproportionate to expect the Appellant to depart the UK to reapply for re-entry. It would constitute a disproportionate interference with the mutual family life of the Appellant, a British citizen child and her British citizen husband. To that extent it seems to me adequately clear that the outcome arrived at by the Judge was correct, albeit he erred in his approach.

31. The error that I have identified was not pleaded. There has been no application to amend. In all the circumstances I decline to set aside the decision of the First-tier Tribunal.

**Notice of Decision**

32. Although the decision of the First-tier Tribunal contained an error of law, such error was not pleaded. The decision otherwise contains no material error of law. In all of the circumstances the decision of the First-tier Tribunal stands.
33. The appeal of Ms [L] remains allowed on human rights grounds
34. No anonymity direction is sought or made.

*The above represents a corrected transcript of ex tempore reasons given at the conclusion of the hearing.*

Signed:

Date: **8 August 2018**

**Deputy Upper Tribunal Judge I A Lewis**