



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/28883/2014

THE IMMIGRATION ACTS

Heard at Field House
On 7 July 2015

Decision and Reasons Promulgated
On 13 July 2015

Before

Deputy Upper Tribunal Judge MANUELL

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

Mr EMEKA STANLEY ONYEHARA
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr N Bramble, Home Office Presenting Officer
For the Respondent: Mr J Maduforo, Solicitor (Tice Madox Solicitors)

DETERMINATION AND REASONS

Introduction

1. The Appellant (the Secretary of State) appealed with permission granted by First-tier Tribunal Judge Cheales on 20 May 2015 against the decision and reasons of First-tier Tribunal Judges Kamara and Harrington who had allowed the Respondent's appeal against the Appellant's decision dated 30 June 2014 to refuse to grant the Respondent leave to remain under Appendix FM of the Immigration Rules and/or under Article 8 ECHR and to remove him from the

United Kingdom. The decision and reasons was promulgated on 18 March 2015.

2. The Respondent is a national of Nigeria, born there on 6 July 1980. He had entered the United Kingdom as a Tier 4 (General) Student Migrant in 2010, varied his leave to remain as a Tier 1 (Post-study Work) Migrant in 2012 and applied for further leave to remain as the spouse of a person settled in the United Kingdom on 2 May 2014. The Secretary of State refused the application as the Respondent met neither paragraph EX.1 of Appendix FM nor paragraph 276ADE of the Immigration Rules. The fact that the Respondent's partner was expecting a child (now born, "Abraham") was not considered to amount to exceptional circumstances warranting a grant of leave to remain outside the Immigration Rules. It was further considered reasonable for the Respondent to leave the United Kingdom and to seek entry clearance before the birth of his child.
3. Judges Kamara and Harrington allowed the appeal under the Immigration Rules. They applied section 85(4) of the Nationality, Immigration and Asylum Act 2002 and took into account relevant post-decision evidence, namely Abraham's birth. They found that (a) it would not be reasonable for the Respondent's child, a British Citizen, to leave the United Kingdom and (b) the couple would face very serious difficulties in the continuation of their family life in Nigeria. The judges found that EX.1 of the Immigration Rules applied. They accordingly did not examine the Appellant's Article 8 ECHR claim which had been raised in the alternative.
4. Permission to appeal to the Upper Tribunal as sought by the Appellant was granted by Judge Cheales because she considered that it was arguable that the judges had misdirected themselves in law as to the test for insurmountable obstacles when allowing the appeal. No evidence was taken as to whether the Respondent's wife and son would in fact leave the United Kingdom if the appeal were unsuccessful.
5. Standard directions were made by the Upper Tribunal, indicating that the appeal would be reheard and remade immediately in the event that a material error of law were found. A rule 24 notice opposing the appeal was filed on behalf of the Respondent, dated 19 June 2015.

Submissions – error of law

6. Mr Bramble for the Secretary of State submitted that this was a clear case of legal error, as the grant of permission to appeal by the First-tier Tribunal indicated. As the grounds of onwards appeal stated, there was no evidence as to whether the Appellant's wife and son would leave the United Kingdom in the event that his appeal failed. The reasons given by the judges for finding that there were "insurmountable obstacles" were neither obstacles unable to be overcome nor did they represent "very serious hardship." These were

questions of choice. The reasoning was inadequate and the decision and reasons could not stand.

7. Mr Maduforo for the Respondent relied on the rule 24 notice and submitted that there was no error of law in the decision and reasons. Mr Maduforo complained of the Secretary of State's approach which had ignored the circumstances of the mother. His submissions need not be further summarised as they amounted to a repetition and reargument of the Respondent's case.

The error of law finding

8. At the conclusion of submissions, the tribunal indicated that it found that the judges had fallen into material error of law, for the reasons succinctly indicated in the grant of permission to appeal by the First-tier Tribunal. It is important to recognise that the Upper Tribunal cannot lightly interfere with decisions made by the First-tier Tribunal. There is no scope for a mere difference of opinion in areas where a range of reasonable opinions consistent with the current law exists. Here, however, it is a question of the substance of the First-tier Tribunal's reasoning and their application of the text of the relevant Immigration Rules. In the tribunal's judgment, the First-tier Tribunal judges gave inadequate reasons for finding that there were insurmountable obstacles which the parties could not overcome nor did the reasons given amount to very serious hardship. The reasons given in the decision and reasons amounted to little more than temporary inconvenience. The judges omitted to consider the other obvious possibilities for compliance with Appendix FM open to the couple, such as the temporary absence of the Appellant while entry clearance was sought. The tribunal ruled that the findings of fact which had not been challenged by the Secretary of State should be preserved. The decision and reasons would otherwise be set aside and the appeal reheard immediately.

The rehearing

9. For clarity the tribunal will now refer to the parties by their original designations in the First-tier Tribunal.
10. Mr Bramble for the Secretary of State relied on his earlier submissions. There were no compelling compassionate or exceptional circumstances. The family life could be lived elsewhere, freely and safely. In any event, the child did not have to leave the United Kingdom as the consequence of the father's removal as the father could seek entry clearance from abroad. His mother who had indefinite leave to remain would be able to care for the child. The interruption to or interference with family life would be proportionate and justified. The appeal should be dismissed.
11. Mr Maduforo for the Appellant submitted that the Appellant's Article 8 ECHR rights and those of his family were crucial. This was a case where there were exceptional circumstances requiring the exercise of discretion outside the Immigration Rules. It was not a just question of individual choice. There was a

child now 9 months old for whom the father cared. The mother worked at night. The child would have to leave the United Kingdom if the father were removed. The appeal should be allowed.

Discussion and fresh decision

12. There was no significant dispute of fact in this appeal. On 1 May 2014 the Appellant married Ms Apie Dominique Irene Adiko ("Ms Adiko"), a national of Ivory Coast with permanent residence in the United Kingdom acquired through her parents through the Immigration (European Economic Area) Regulations 2006. At the date of the marriage the Appellant was not settled in the United Kingdom but had temporary leave to remain as a Tier 1 (Post-study Work) Migrant, expiring on 3 May 2014. He sought to vary that leave on 2 May 2014 by seeking leave to remain as the spouse of a person settled in the United Kingdom. At the date of that application, and at the date of the Secretary of State's decision, Ms Adiko was pregnant. Abraham was born on 2 October 2014, a post- decision fact which the tribunal can and should take into account. Abraham took British nationality, despite the fact that neither of his parents is a British Citizen, because of his mother's settled status. Ms Adiko is studying nursing and works part time. It was accepted that her income falls below the requirements of Appendix FM and there are no relevant savings. The Appellant looks after Abraham when Ms Adiko is at work. Ms Adiko's parents hold German nationality. Both her parents are working and live in the United Kingdom. The Appellant's parents live in Lagos, Nigeria, with their five children.

13. The Appellant sought to rely on EX.1 of Appendix FM of the Immigration Rules, which is in the following terms:

Section EX: Exceptions to certain eligibility requirements for leave to remain as a partner or parent

EX.1 This paragraph applies if

(a)

(i) the applicant has a genuine and subsisting parental relationship with a child who -

(aa) is under the age of 18 years, or was under the age of 18 years when the applicant was first granted leave on the basis that this paragraph applied;

(bb) is in the UK;

(cc) is a British Citizen or has lived in the UK continuously for at least the 7 years immediately preceding the date of application; and

(ii) it would not be reasonable to expect the child to leave the UK;

or

(b) the applicant has a genuine and subsisting relationship with a partner who is in the UK and is a British Citizen, settled in the UK or in the UK with refugee leave or humanitarian protection, and there are insurmountable obstacles to family life with that partner continuing outside the UK.

EX.2. For the purposes of paragraph EX.1.(b) “insurmountable obstacles” means the very significant difficulties which would be faced by the applicant or their partner in continuing their family life together outside the UK and which could not be overcome or would entail very serious hardship for the applicant or their partner.

14. The tribunal finds that there was no evidence produced on behalf of the Appellant showing that it was necessary for his British Citizen child to leave the United Kingdom in the event that the Appellant left or were removed. There was equally no evidence produced showing that the Appellant and his wife and child could not settle freely and safely in Nigeria, the Appellant’s home country where the Appellant has close family. The Appellant was in the United Kingdom on a temporary basis at all stages when his relationship with Ms Adiko was formed. He married her shortly before his leave was due to expire and thus he and she knew that he would have return to Nigeria unless he could satisfy Appendix FM.
15. Whether the couple remain in the United Kingdom or move to Nigeria, it is obvious that that choice would involve physical separation from one half of the relevant wider family circle. There is no real connection between the Appellant and the United Kingdom, his studies and post study work having concluded. Ms Adiko lived in Ivory Coast where she was born and also lived in Germany for 11 years. Her connection with the United Kingdom consists mainly of her studies and the presence of her parents.
16. The tribunal finds that the choice of going to Nigeria to live there as a family is plainly open to the Appellant and his wife. Her current studies would be temporarily interrupted but no evidence was produced to show that they could not be resumed in another country with credit for examinations passed to date.
17. Equally plainly, the Appellant and his wife prefer not to make that choice. Nor, it seems, are they willing for the Appellant to return to Nigeria to seek entry clearance from there, because the financial requirements of Appendix FM cannot be satisfied at the present time. But the tribunal finds that these, too, amount to no more than questions of personal choice. Ms Adiko can defer completion of her current studies and seek employment in the United Kingdom at a rate sufficient to meet the sponsorship requirement laid down by parliament in Appendix FM. That will involve some delay in that the documents required to evidence compliance must cover a period of 6 months. Such work may involve payment for child care for Abraham however that is a normal incidence of having young children, when both parents often have to work to provide for themselves and their children as they may wish. Some

employers provide crèches at work and there may be other solutions. There was no evidence that any such solution has been explored or even examined by the Appellant and his wife. Equally the Appellant can return to work in Nigeria and transfer savings to his wife with a view to her future sponsorship.

18. None of these matters in the tribunal's judgment is capable on the facts of this appeal of amounting to "very serious hardship" within the terms of paragraph EX.2. The hardships identified on behalf of the Appellant and his family amount in summary to a modest income, a wish not to disrupt Ms Adiko's studies and a young child. Any difficulties which result are far from unusual for any young couple and all of which are capable of being overcome by various simple and straightforward means. The Appellant and his wife elected to marry and to procreate knowing that the Appellant would require a variation of leave to remain under the stringent provisions of Appendix FM. The appeal under the Immigration Rules fails.
19. Article 8 ECHR was raised as a separate ground of appeal. No specific private life claim was pursued on the Appellant's behalf, no doubt because it would be met by Nasim and Others (Article 8) [2014] UKUT 00025 (IAC), which applies to the Appellant's private life in the United Kingdom. Family life was the principal claim. The live issue applying the Razgar [2004] UKHL 27 tests is proportionality. SS (Congo) [2015] EWCA Civ 387 provides a guide to the principles which apply.
20. An essential element of the proportionality assessment is the best interests of Abraham. There was in fact no evidence which showed that the best interests of Abraham required him to remain in the United Kingdom. His best interests are plainly to reside with his loving and competent parents, wherever that might happen to be. It is entirely foreseeable that the Appellant's extensive IT qualifications might lead to attractive job offers in many different countries. Ms Adiko also no doubt has relevant and marketable skills, linguistic and otherwise. Families regularly move whole continents in search of better employment, as was the case with Ms Adiko's parents who have moved countries twice. There was no suggestion that Ms Adiko suffered from leaving the land of her birth and living in two foreign countries, so far. Abraham will, of course, retain his British Citizenship wherever he lives, but it is more important for him to be with his parents than to remain in the United Kingdom. Zambrano [2011] EUECJ C-34/09 is of no direct relevance as he is not facing removal as such. Nor is his mother.
21. The fact that the Appellant meets some of the factors listed in section 117B of the Nationality, Immigration and Asylum Act 2002, e.g., he speaks English, does not create a right for him to stay in the United Kingdom. They are merely factors which must be taken into consideration, and the tribunal has done so.
22. The legitimate objective under Article 8.2 ECHR is immigration control, which embraces many related matters. An important aspect of immigration control

for the purposes of the present appeal is that the decision as to which non citizens are permitted to settle in the United Kingdom is not a matter of private choice, whether or not there will be any measurable cost or indeed potential economic benefit from such settlement. There has to be a rule, democratically determined, which applies to all. Those rules, already strict, were made far stricter by parliament from 9 July 2012 onwards, a process which continues.

23. In the tribunal's view, the proportionality balance is against the Appellant. He and his family are simply being required to comply with the Immigration Rules which apply to everyone. His departure or removal to his home country to await entry clearance when he is in a position to satisfy Appendix FM of the Immigration Rules cannot be regarded as unreasonable nor will it create consequences which can sensibly be considered as unduly harsh for him or his family. Whether they separate temporarily or remain together is their choice.
24. Thus, however the Appellant's appeal is analysed, it must fail.
25. There was no application for an anonymity direction and the tribunal sees no need for one.

DECISION

The making of the previous decision involved the making of an error on a point of law. The tribunal allows the onwards appeal to the Upper Tribunal, sets aside the original decision and remakes the original decision as follows:

The appeal is dismissed

Signed

Dated

Deputy Upper Tribunal Judge Manuell

TO THE RESPONDENT

FEE AWARD

The appeal was dismissed. There can be no fee award

Signed

Dated

Deputy Upper Tribunal Judge Manuell