Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/33095/2014**

THE IMMIGRATION ACTS

Heard at Field House	**Decision and Reasons Promulgated**
On 15 September 2015	**On 17 September 2015**

Before

Deputy Upper Tribunal Judge MANUELL

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

Mr OLUWASEUN AKANBI BABATUNDE
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Mr E Tufan, Home Office Presenting Officer
For the Respondent: Mr R Ojokotola, Authorised Representative (SLA Solicitors)

DETERMINATION AND REASONS

Introduction

1. The Appellant (the Secretary of State) appealed with permission granted by First-tier Tribunal Judge N J Osborne on 15 May 2015 against the decision and reasons of First-tier Tribunal Judge O'Keefe who had allowed the Respondent's appeal against the Secretary of State's decision dated 4 August 2014 to refuse to grant the

Respondent settlement under Appendix FM of the Immigration Rules. The decision and reasons was promulgated on 23 March 2015.

2. The Respondent is a national of Nigeria, born there on 23 February 1987. He had married his sponsor in the United Kingdom on 29 November 2013. They have a child who was born on 27 December 2014, which was after the Respondent's application had been made in December 2013. The Respondent's application was refused because the financial requirements of paragraph E-LTRP.3.1 of Appendix FM were not met. Paragraph EX.1 was inapplicable. It had been accepted in the reasons for refusal letter that the Respondent had a genuine and subsisting relationship with his British Citizen wife, his sponsor. The Secretary of State maintained that there were no exceptional circumstances and no breach of Article 8 ECHR as family life could be lived outside the United Kingdom.

3. It was accepted before Judge O'Keefe that the Respondent was unable to meet the maintenance requirements of Appendix FM, but it was contended that the Respondent met the requirements of paragraph EX.1(a) as the father of a British Citizen child. Judge O'Keefe noted the changed circumstances and found that the Respondent met the requirements of paragraph EX.1(a) of Appendix FM of the Immigration Rules. The judge therefore did not consider Article 8 ECHR.

4. Permission to appeal to the Upper Tribunal as sought by the Appellant was granted by Judge Osborne because he considered that it was arguable that the judge had failed to consider all the appropriate factors pertinent to the appeal. The judge had failed to give any appropriate consideration to section 117B of the Nationality, Immigration and Asylum Act 2002 and had failed to consider the public interest.

5. Standard directions were made by the Upper Tribunal.

Submissions – error of law

6. Mr Tufan 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. EX.1(a) had not been met because the child had not even been born at the date of the Secretary of State's decision. But more relevant was the fact that the judge had given no consideration to the question of whether it would be reasonable for the child to leave the United Kingdom. That was a matter which had to be considered under section 117B(6) of the Nationality, Immigration and Asylum Act 2002. The Respondent had the option of leaving the United Kingdom and making an entry clearance application from Nigeria. This was a possibility considered in Chen [2015] UKUT 00189 (IAC). SS (Congo) [2015] EWCA Civ 387 showed that merely being a British Citizen was not a reason why a child could

not leave the United Kingdom. There had been no evidence to show that it would not be reasonable for the child to leave. Agyarko [2015] EWCA Civ 440 was relevant to the issue of "insurmountable obstacles". The determination should be set aside and the decision remade.

7. Mr Ojokotola for the Respondent submitted that there was no material error of law in the determination. The judge had found that the Respondent had been in the United Kingdom lawfully at all times. In fact he was now in a position to meet the financial requirements of Appendix FM, although that point had been rightly conceded at the hearing before Judge O'Keefe. The relationship with his British Citizen daughter had been accepted by the judge. The fact that the judge had made no express reference to section 117B did not vitiate her decision as she had considered the substance of the issue: see AM (S 117B) Malawi [2015] UKUT 0260 (IAC).

The error of law finding

8. At the conclusion of submissions, the tribunal indicated that it found that the judge had fallen into material error of law, for the reasons succinctly indicated in the grant of permission to appeal by the First-tier Tribunal. This should not be seen a reflection on the judge, but rather an indication of the conceptual difficulties which arise in this area of the law. Paragraph EX.1(a) of Appendix FM did not apply at the date of the Secretary of State's decision as the child had not been born. The basis of the refusal under Appendix FM had been the financial requirements which it had been accepted before the judge had not been met. In any event, the judge had omitted to consider the reasonableness question which arises under paragraph EX.1(a), or had done so in a manner which was insufficiently clearly reasoned which was a material error of law in itself. Thus if satisfied that there were exceptional circumstances, the judge had been required to consider the situation outside the Immigration Rules under Article 8 ECHR, which was a matter requiring consideration at the date of the hearing and the application of section 117B. That not been done, as it should have been. There was, however, no challenge to the judge's findings of fact, which would stand. The decision and reasons would be set aside and the appeal reheard immediately on the basis of submissions. (Time to prepare submissions was given to Mr Ojokotola.)

The rehearing and fresh decision

9. For clarity the tribunal will now refer to the parties by their designations in the First-tier Tribunal.

10. Mr Ojokotola for the Appellant submitted that the relevant finding was that the Appellant had a genuine relationship with his daughter, a British Citizen born in the United Kingdom. The child's mother was

also a British Citizen, born in the United Kingdom. It was not reasonable for the child to leave the United Kingdom. The child was entitled to remain on the basis of her British nationality. Thus the appeal should succeed on the basis of paragraph EX.1(a) of Appendix FM. The same result was achieved by consideration of paragraph 276ADE(iv) and section 117B(6). The father, i.e., the Appellant, should not be required to leave the United Kingdom to make an entry clearance application, which would amount to an unreasonable obligation.

11. Mr Tufan for the Respondent submitted that paragraph EX.1(a) was inapplicable as the Appellant's child had not been born as at the date of the Secretary of State's decision. There was nothing in the judge's findings which could be seen as amounting to exceptional circumstances. There was thus no need to consider Article 8 ECHR. If there were, AM (S 117B) Malawi [2015] UKUT 0260 (IAC) applied. The Appellant's immigration status had been precarious as (5) of the case headnote of AM showed. The child was a dual national and could live in Nigeria which was a reasonable choice for her parents to make. In any event the Appellant could leave the United Kingdom to seek entry clearance and his short absence would not be prejudicial to the child. Chen [2015] UKUT 00189 (IAC) was applicable. It was proportionate for entry clearance to be sought or indeed a fresh "in country" application provided that it was made promptly.

12. In reply, Mr Ojokotola submitted that the Respondent's construction of paragraph EX.1(a) was mistaken. The child in question was a British Citizen and that was an end of the matter. The child's mother had always lived in the United Kingdom. The child had medical needs.

13. The tribunal reserved its decision which now follows. As at the date of decision, the Secretary of State had no reason to know of the existence of the Appellant's child, who was born months after the Appellant's application had been refused under Appendix FM on financial grounds. The Appellant had been free to make another application to the Home Office instead of appealing to the First-tier Tribunal. His documents were retained to facilitate removal in the event that he did not depart voluntarily but that did not prevent a fresh application, addressing the deficiencies of the refused application. In the tribunal's view, paragraph EX.1(a) was not applicable at the date of the Respondent's decision and the First-tier Tribunal was not entitled to consider the birth of the child, notwithstanding the terms of section 85(4) of the Nationality, Immigration and Asylum Act 2002. It was not a matter which the Appellant had raised in his Notice of Appeal in response to the section 120 notice served by the Respondent. It was a completely new situation which demanded a fresh application to the Home Office.

14. If for any reason that may be considered too narrow an approach, the tribunal will consider paragraph EX.1(a) in any event. Plainly the child

cannot be required to leave the United Kingdom but her parents were already contemplating a family visit to Nigeria, subject to the child's health, as Judge O'Keefe found at [31] of her decision and reasons. The judge also found that the Appellant had ties in the form of friends and family in Nigeria. While it is the case that the child would have the benefits of British Citizenship by remaining in the United Kingdom, there was no evidence that living in Nigeria would be a second best option for her, let alone one which would cause her harm. She is still a baby so could hardly be better placed to adapt, if any adaption were required. There was no evidence that any medical follow up could not be made in Nigeria. She has relatives there. As her father came to the United Kingdom as a student, it follows that he applied on the basis that he would be returning to Nigeria, as indeed he has, most recently for a visit in 2013. The child's mother was born in the United Kingdom yet has Nigerian heritage. There was no evidence that the family could not settle in Nigeria with ease. There was certainly no evidence of insurmountable obstacles. The Appellant's wife might have to leave some of her United Kingdom based family behind, but of course he faces a similar problem by settling in the United Kingdom.

15. The obvious alternative to the child's leaving United Kingdom with her parents (which for the reasons given the tribunal considers is reasonable in all the circumstances: see the discussion in SS (Congo) [2015] EWCA Civ 387) is for the Appellant to obtain entry clearance from Nigeria. There was no evidence that this would take more than 90 days. Part of that time could if the Appellant and his wife chose be spent as the family visit which they said had been planned. There was no evidence that his temporary absence would cause serious hardship let alone harm to anyone: see Chen [2015] UKUT 00189 (IAC). Such a choice (which is a matter for the Appellant and his wife) is a reasonable one and need not involve the child's leaving the United Kingdom against her parents' will. The tribunal finds that the Appellant fails to satisfy paragraph EX.1 (a) as his temporary absence will not require his British Citizen child to leave the United Kingdom.

16. There was no evidence that the Appellant's temporary absence would cause serious hardship to anyone. Thus there was no need for the Respondent to consider the exercise of her discretion outside the Immigration Rules.

17. Again, if for any reason that were wrong or were too restrictive an approach, the tribunal will now consider section 117B of the Nationality, Immigration and Asylum Act 2002 in the Article 8 ECHR context. The live issue for the Razgar [2004] UKHL 27 analysis is proportionality.

18. Although it was not in dispute that the Appellant speaks English and is financially self sufficient, AM (S 117B) Malawi [2015] UKUT 0260 (IAC) shows that these factors are not true positives and confer no right on

the Appellant whose status as at the date of his application for further leave to remain was precarious. The real issue is section 117B(6), i.e., whether it is reasonable to expect the child to leave the United Kingdom as a consequence of the Appellant father's departure/removal. This brings the tribunal back to the gravamen of paragraph EX.1(a). The tribunal need not repeat the reasons which have already been given for finding that the child does not have to leave the United Kingdom but that it is reasonable in all the circumstances for the Appellant to leave the United Kingdom on a temporary basis to make an entry clearance application. Chikwamba [2008] UKHL 40 has no application to the facts of the present appeal.

19. Indeed, unless the tribunal is mistaken, the Appellant still has the further option of making a fresh "in country" application under Appendix FM within 28 days of the promulgation of this determination, the window which is granted under the post 9 July 2012 Immigration Rules. This would not require him to travel abroad to make an entry clearance application.

20. 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

As the appeal was dismissed, there can be no fee award

Signed **Dated**

Deputy Upper Tribunal Judge Manuell