



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

Appeal Number: IA/17361/2015

THE IMMIGRATION ACTS

**Heard at Field House
On 17 October 2017**

**Decision & Reasons Promulgated
On 27 October 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE NORTON-TAYLOR

Between

**OLUWADIMIMU OLALEKAN ADEWALE
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr P Turner, Counsel, instructed by A C Gilead Solicitors
For the Respondent: Ms Z Ahmad, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal by the Appellant against the decision of First-tier Tribunal Judge M R Oliver (the judge), promulgated on 30 November 2016, in which he dismissed the Appellant's appeal on human rights grounds. That appeal had been against the Respondent's decision of 22 April 2015, refusing his human rights claim, which in turn was based essentially on his relationship with his British daughter. The Appellant had previously been granted discretionary leave as a parent of his daughter on 2 August 2012. His latest claim, made on 26 January 2015 was for an extension of that leave.

The judge's decision

2. The judge found that the Appellant and his daughter's mother were not partners within the meaning of Appendix FM to the Rules. At paragraph 13 the judge finds that the Appellant could not succeed under the partner route and that as a result he could not succeed under the parent route either. He deemed the Appellant to be less than reliable in respect of aspects of his evidence. The judge had found that it would be in the best interests that the Appellant's two British children (a second child having been born in September 2016) lay in remaining with their mother in the United Kingdom. Having found that the Appellant could not succeed under Appendix FM, the judge went on to consider the Article 8 claim outside the context of the Rules. He finds that the Appellant did not have a genuine and subsisting parental relationship with his children because, notwithstanding the biological paternity, he was not, "able physically or practically to look after them. He cannot accommodate them and he does not have a relationship comparable with that of a 24 hour hands on parent". In light of this the judge concluded that the Respondent's decision was proportionate.

The grounds of appeal and grant of permission

3. The concise grounds assert that the judge has erred in his approach to Appendix FM, having misdirected himself in material respects as to the requirements of the Rules. Permission to appeal was granted by First-tier Tribunal Judge Andrew on 22 August 2017. That judge notes that in addition to the contents of the grounds it was arguable that there were no clear findings in respect of relevant matters under Appendix FM, in particular whether the Appellant had shown that he would continue to have an active role in the upbringing of the children.

The hearing before me

4. At the outset of the hearing I indicated to both representatives that there appeared to be material errors of law by the judge in respect both of Appendix FM and also Article 8 "at large". Ms Ahmad agreed with my initial assessment and accepted that there were material errors in the judge's decision.
5. Both representatives agreed that this case should be remitted to the First-tier Tribunal on the basis not simply of errors in approach to the Rules, but also a lack of findings on relevant issues. I agreed with that course of action, having regard to the particular issues in this case, the lack of findings and paragraph 7.2 of the Practice Statement.

Decision on error of law

6. There are in my view a number of material errors of law in the judge's decision and I now set them out.
7. First, the inability of an applicant to satisfy the requirements of the partner route under Appendix FM does not necessarily lead to a failure under the parent route. In this respect the judge has erred in paragraph 13 when he certainly appears to conflate the two different paths under the Appendix.
8. Second, the judge has failed to have regard to E-LTRPT.2.3 and 2.4 under Appendix FM in respect of the parent route. If, as the judge found, the Appellant was not the partner of his children's mother, these two provisions fell to be assessed. The failure to do so is an error.
9. Third, in addressing the issue of whether there was a genuine and subsisting relationship (which may to an extent incorporate issues of an active role in the children's upbringing), the judge has misdirected himself as to the correct approach. In cases involving the two biological parents of children where those parents are living apart, the test cannot necessarily include a requirement that accommodation and/or a relationship comparable with that of a "24 hour hands on parent" be met. The whole point about E-LTRPT.2.3 and 2.4 is that one parent is not living with the children full-time. The issue under E-LTRPT2.4(a)(ii) is whether the Appellant had direct access to the child or children and, under (b), whether he provided evidence that he was taking and continued to take an active role in the child or children's upbringing. These issues have not been addressed by the judge.
10. Fourth, on the basis that the financial requirements under Appendix FM had not been met, EX.1 then became relevant. The judge failed to address this issue. If it had been addressed the outcome would not have been inevitably in the Respondent's favour. Aside from the judge's failure to address EX.1, and in particular the correct approach to whether there was a genuine and subsisting parental relationship with the child or children, he had found that the children's best interests lay in remaining in the United Kingdom. Whilst that is not determinative of the reasonableness of them leaving this country, it was clearly relevant. Overall, the failure to approach all of these issues correctly leaves me to conclude that the errors are material.

Disposal

11. As stated previously, I have decided to remit this appeal. I have not done so without hesitation. I appreciate that cases should not be remitted as a matter of routine. However, in this appeal there are a number of fact-specific issues which were not addressed by the judge. There is an

absence of findings on important matters. It is only right that all relevant questions are dealt with fully by the First-tier Tribunal.

Notice of Decision

The decision of the First-tier Tribunal contained material errors of law.

I set aside the decision of the First-tier Tribunal.

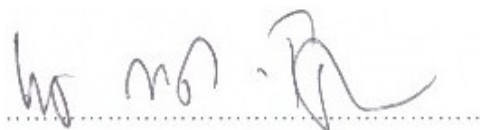
I remit this appeal to the First-tier Tribunal.

Directions to the First-tier Tribunal

- 1) this appeal is remitted for a complete rehearing, with no findings of fact preserved;**
- 2) there will need to be a careful assessment of the Appellant's case within the context of the relevant Rules, in particular the parent route under Appendix FM and, if these requirements are not met, in respect of Article 8 at large.**

No anonymity direction is made.

Signed



Date: 23 October 2017

Deputy Upper Tribunal Judge Norton-Taylor