Upper Tribunal
(Immigration and Asylum Chamber) Appeal no: **AA 11084-13**

THE IMMIGRATION ACTS

At **Field House**	Decision signed: **26.06.2014**
on **23.06.2014**	sent out: **21.07.2014**

Before:

Upper Tribunal Judge
John FREEMAN

Between:

Michael Chukwuka OGUAZU

appellant

and

Secretary of State for the Home Department

respondent

Representation:

For the appellant: *Barnaby Hone* (counsel instructed by direct access)
For the respondent: Mr Nigel Bramble

DETERMINATION AND REASONS

This is an appeal, by the respondent to the original appeal, against the decision of the First-tier Tribunal (Judge SJ Widdup), sitting at Hatton Cross on 3 March, to allow an appeal by a citizen of Nigeria, born 28 September 1981. Despite the case reference letters, his application had been made under article 8 only, on the basis of his family life with his partner/wife, whose name is only given as "Ms Nwosu", a British citizen, and their son Teodor, born 4 March 2013, who is therefore a British citizen too. The application, made on 26 March 2013, and no doubt silently acknowledging that the appellant could not succeed under the 'new Rules' (in force from 9 July 2012), since he had entered this country as a visitor, specifically asked (at section 3) for "discretionary leave under EX.1 of the 'new Rules', which follows:

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.

2. The decision letter refused the application

(a) under the partner route;

(b) under the parent route; and

(c) under private life

The only point taken, on the facts or at all, under (a), was that the appellant had not, according to the Home Office, been living with his partner in a relationship akin to marriage for at least two years, as required by paragraph GEN.1.2 of the Rules. EX.1 was referred to as applying; but no point was taken on it on the facts. Instead that part of the decision simply went on to refer to what was said to be the appellant's "… failure to show that you meet those requirements, and therefore your application falls for refusal under [*the relevant Rules*]".

3. The factual point taken in the decision letter on route (b) was that the appellant didn't have "… sole parental responsibility for your child and you are also eligible for consideration under the partner route". The letter went on

> We have carefully considered whether EX.1 applies to your application, however while we acknowledge that you have a genuine and subsisting parental relationship with a child, your application falls for refusal under the eligibility requirements of the Immigration Rules as set out earlier. These are mandatory requirements which apply to all appellants, regardless of whether the EX.1 criteria are met. As you have failed to meet those eligibility requirements, you cannot benefit for the criteria set out at EX.1.

4. I don't need to deal with route (c), since paragraph 276ADE of the Rules, to which that applies, is not subject to EX.1, on which this appeal turns. The judge said at paragraph 2

> … the issue in this appeal is whether [the appellant] meets the requirements of either the partner route or appendix FM or is entitled to succeed under article 8.

Mr Hone submitted, that, according to counsel (Miss Julian Norman) who had appeared before the judge, the presenting officer (Mr Graham) had

agreed that the only issue before the judge was whether or not the appellant had been living with Ms Nwosu for two years (before the date of the application, [*as the judge found, though perhaps it should have been the date of the hearing, as this was an in-country, not points-based case*] . This issue had been decided by the judge in the appellant's favour; so he was entitled to succeed on that basis: the judge did not go on to consider article 8 in general.

5. Mr Hone's alternative argument was that, on the judge's findings of fact, this appellant in any case satisfied the requirements of EX.1. In my view, since it is agreed that requirements (aa), (bb) and (cc) of that rule are met, the only one where the judge would have needed to make a finding, if he did have to consider EX.1, was (ii): was it reasonable to expect Teodor to leave the UK?

6. Mr Bramble's argument on that point was that it would be possible for this whole family to live in Nigeria, from where Ms Nwosu originally came. Mr Hone's reply to that was that there had been evidence before the judge that Ms Nwosu was regularly taking Teodor to hospital appointments for an eye problem.: he suggested that this might also amount, for the appellant, to 'insurmountable obstacles to family life with that partner continuing outside the UK' in terms of requirement (b); and *Sanade* (at paragraph 5 of the judicial head-note) suggested that it could not be reasonable for them all to relocate as a unit, where either the child or the remaining spouse was a citizen of the European Union.

7. The Home Office had not considered at all whether or not it would be reasonable to expect Teodor to live outside the UK; nor whether there were insurmountable obstacles to the whole family doing so, and neither did the judge, understandably if the issue on the appeal was presented to him as being only whether the appellant and Ms Nwosu had been living together for two years at the relevant date.

8. In my view, there was a clear mistake of law on the Rules in the decision letter, on both the partner and the parent route: in both cases, as can be seen from the passages set out at **2 – 3**. The letter had treated EX.1, not as an exception to the eligibilty rules, which it clearly is from their terms; but as something which failure to meet the requirements of those rules meant could not be considered at all. If the appellant had had no statutory right of appeal against the decision, then he would have been entitled to have it set aside on judicial review. The Home Office grounds of appeal to the Upper Tribunal did not make this mistake, arguing instead that "… the application should have failed on the mandatory eligibility criteria, unless EX.1 applied".

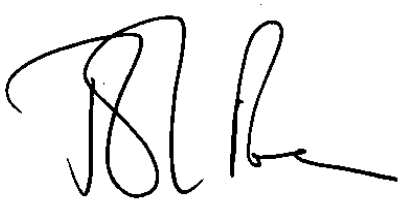
9. That is a correct statement of the law under the Rules: the question for me is first, whether the judge needed to deal with EX.1, whether or not failure to meet its requirements had been put forward as an issue before him. *RM* (Kwok On Tong: HC395 para 320) India [2006] UKAIT 00039 does not deal with a similar point on its own facts, but with the question of whether a finding in the appellant's favour under the general provisions of the Rules entitled him to succeed on the appeal without further

consideration, where the general provisions had been the only issue raised. The older authority to which the long title refers may be more in point, but is not available, either on www.bailii.org, or the Tribunal's own web-site.

10. I need to consider the alternatives open to the judge, which in my view were either to declare the Home Office decision unlawful, and refer it back for reconsideration by them; or to allow the appeal against it, on the issues put before him. There had been no decision by the Home Office on the requirements of EX.1, because they wrongly took the view that it could not arise, where the other eligibility requirements were not met; If EX.1 gave a discretion, then arguably it had needed to be exercised by the Home Office themselves; but it is quite clear from the various eligibility paragraphs which refer to it that it provides an exception under the Rules, rather than giving a discretion. It was a requirement of the Rules, like any other, on which the judge could make a decision, if it was in issue before him.

11. In my view, the present case can be distinguished from *RM* (Kwok On Tong: HC395 para 320): the decision under appeal had not been given under the 'general provisions', but on what the Home Office saw as the merits of the case under the Rules applicable to it. If first the decision-maker, and then the presenting officer chose to limit the issues as they did, then the judge was entitled to allow the appeal under appendix FM, on the only issue put before him, which was whether the appellant and Ms Nwosu had been living together for two years, at the relevant time, as he found; though arguably the relevant date was that of the decision, this would have made no difference. The judge found in the appellant's favour on that point, after full and critical consideration, and that should have been the end of it.

Home Office appeal dismissed



(a judge of the Upper Tribunal)